Supreme Court, U.S.
FILED

06-873 DEC 19 2006

No. 06- OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

MOHAWK INDUSTRIES, INC.,

Petitioner,

v.

SHIRLEY WILLIAMS, GALE PELFREY, BONNIE JONES, AND LORA SISSON, individually and on behalf of a class,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether plaintiffs' alleged wage-suppression damages are a direct injury under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 ("RICO"), and whether the Eleventh Circuit's holding can be reconciled with *Anza* v. *Ideal Steel Supply Co.*, 126 S. Ct. 1991 (2006).

2. Whether a corporation and its agents can constitute an association-in-fact RICO enterprise and whether a company's hiring of its own employees may constitute participation in the conduct of an enterprise that is distinct from the company itself?

3. Whether employees who received the wages for which they contracted have suffered an injury to "business or property" within the meaning of 18 U.S.C. § 1964(c)?

STATEMENT REQUIRED BY RULE 14.1

Pursuant to Supreme Court Rule 14.1, petitioner states that all parties to the proceeding in the court whose judgment is sought to be reviewed are listed in the caption above.

STATEMENT REQUIRED BY RULE 29.6

Pursuant to Supreme Court Rule 29.6, petitioner Mohawk Industries, Inc. states that there is no parent corporation or publicly held corporation that owns 10% or more of Mohawk Industries, Inc.'s stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Mohawk Industries, Inc. ("Mohawk") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the district court denying in part and granting in part petitioner's motion to dismiss was reported at 314 F. Supp. 2d 1333 (N.D. Ga. 2004) and is reproduced in the appendix (Pet. App.) at 32a-69a. The order of the district court certifying the case for interlocutory appeal was unpublished and is reproduced at Pet. App. 70a-74a. The order of the Eleventh Circuit granting Mohawk's petition for interlocutory appeal was unpublished and is reproduced at Pet. App. 75a. The June 9, 2005 opinion of the court of appeals affirming in part and reversing in part the district court's order was published at 411 F.3d 1252 (11th Cir. 2005) ("*Williams I*"). The order of the court of appeals denying rehearing en banc for *Williams I* was unpublished and is reproduced at Pet. App. 76a. This Court's December 12, 2005 order granting certiorari limited to the first question in Mohawk's petition was published at 126 S. Ct. 830 (2005) and is reproduced at Pet. App. 30a. This Court's June 5, 2005 order dismissing its partial grant of certiorari as improvidently granted, granting certiorari without limitation, vacating *Williams I*, and remanding to the Eleventh Circuit for reconsideration in light of *Anza* v. *Ideal Steel Supply Corp.*, 126 S. Ct. 1991 (2006), was published at 126 S. Ct. 2016 (2006) and is reproduced at Pet. App. 31a. The September 27, 2006 opinion of the court of appeals after remand was published at 465 F.3d 1277 (11th Cir. 2006) ("*Williams II*") and is reproduced at Pet. App. 1a-29a. The order of the court

of appeals denying rehearing en banc for *Williams II* was unpublished and is reproduced at Pet. App. 77a.

JURISDICTION

The judgment of the court of appeals was entered on September 27, 2006. An order denying rehearing was entered on November 22, 2006. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The relevant statutory provisions are listed in the appendix. See Pet. App at 78a-79a.

STATEMENT OF THE CASE

This case presents three important questions about the scope and construction of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 ("RICO"), which have divided the courts of appeals and which have significant consequences for civil RICO litigation. Plaintiffs filed this RICO suit on behalf of a putative class of current and former hourly employees of Mohawk. Plaintiffs allege that Mohawk hired illegal immigrants and thereby suppressed the wages that plaintiffs were offered and voluntarily accepted. The Eleventh Circuit's ratification of this theory of liability (i) is at odds with this Court's direct injury holding in *Anza* v. *Ideal Steel Supply Corp.*, 126 S. Ct. 1991 (2006), (ii) exacerbates a deep split among the courts of appeals over RICO's association-in-fact enterprise requirements, and (iii) adds to widening circuit conflicts over the meaning of civil RICO's injury to "business or property" standing requirement.

Last Term, this Court initially granted certiorari in this case to resolve the second of these three questions: namely, whether a defendant corporation can conduct or participate in

the conduct or the affairs of a distinct association-in-fact enterprise where the only members of the putative "association-in-fact enterprise" are the corporation and its agents. That question was argued before this Court on April 26, 2006. In light of this Court's *Anza* decision, this Court chose not to resolve the enterprise issue, instead granting certiorari in this case on the direct injury question presented, vacating the Eleventh Circuit's opinion, and remanding this case for reconsideration in light of *Anza*.

On remand, however, the Eleventh Circuit ignored the central holding of *Anza*—that RICO civil plaintiffs must plead an injury directly caused by the RICO predicate acts and not by another "set of actions ... entirely distinct from the alleged RICO violation." *Id.* at 1997. Instead, the Eleventh Circuit fundamentally misread *Anza* to hold that it is enough for civil RICO standing where there is some "correlation" between the predicate act (illegal hiring) and the asserted injury (depressed wage levels). See Pet. App. at 18a. This cramped misinterpretation limits *Anza* to its facts and deprives the case of its import: confining RICO civil litigation to instances where the alleged injury actually stems from the RICO violation itself—and not from other tangential acts. Other courts of appeals have faithfully executed the clear holding in *Anza*, which makes the Eleventh Circuit's approach particularly worthy of this Court's review.

This case also presents a second critical and still unresolved question on which this Court granted certiorari in this case last Term: whether a corporation can constitute an association-in-fact RICO enterprise and whether such an enterprise is distinct from the defendant corporation itself. As the Eleventh Circuit candidly acknowledged, its decision below "puts our circuit in conflict" with the Seventh Circuit's construction of the enterprise requirement in a materially indistinguishable case. Pet. App. at 10a. Indeed, the split in the courts of appeals on this question has widened to a 3-3 split, as the Ninth Circuit has joined the Sixth and Eleventh

Circuits in concluding that such enterprises are distinct and thus permissible, while the Second, Third, and Seventh Circuits have held they are not. This split warrants this Court's attention at least as much as it did last Term.

The third question meriting this Court's review is whether plaintiffs have alleged an injury to their "business or property," as required for civil RICO standing by 18 U.S.C. § 1964(c). The courts of appeals are deeply divided on the extent to which state law defines the interests that convey standing under civil RICO. Below, the Eleventh Circuit held that plaintiffs had a sufficient interest because they have "a legal entitlement to business relations unhampered by schemes prohibited by the RICO predicate statutes." Pet. App. at 13a (internal quotation marks omitted). That "entitlement," however, is neither a property right nor a business under civil RICO.

In reaching these flawed conclusions, the Eleventh Circuit's decision permits plaintiffs to proceed with RICO suits based upon ordinary business conduct. As Justice Breyer noted during oral argument in this case last Term, Congress never intended to "RICO-ize, with its treble damages and private plaintiffs and everything, vast amounts of ordinary commercial activity." Tr. Oral Arg. at 44-45, *Mohawk Indus., Inc.* v. *Williams*, 126 S. Ct. 2016 (2006) (No. 05-465). But that is precisely what the Eleventh Circuit (and other courts of appeals) has permitted: a suit, alleging a contrived enterprise based upon ordinary business contracts, brought by plaintiffs with no cognizable injury, and certainly, no injury directly caused by the conduct prohibited by RICO. The Court should grant certiorari to help restore civil RICO to its proper role: that of a narrowly drawn remedy aimed at providing redress to the direct victims of crimes—not a blunderbuss weapon employing *in terrorem* remedies to extort windfall recoveries.

1. On January 6, 2004, the respondents filed a complaint in the United States District Court for the Northern District of Georgia on behalf of a putative class of current and former

hourly employees of petitioner Mohawk. Pet. App. at 85a-109a. Mohawk was the only named defendant. Mohawk (and its subsidiaries) is a leading manufacturer of carpet, rugs, tile, and other floor coverings. Plaintiffs asserted a federal RICO claim under 18 U.S.C. § 1962(c), two claims under Georgia's RICO statute (Ga. Code Ann. § 16-14-4), and a claim for unjust enrichment. All of these claims stemmed from plaintiffs' allegation that Mohawk had knowingly employed illegal aliens and that this employment of illegal workers somehow depressed wages for all of Mohawk's legal hourly workers throughout the State of Georgia.[1] See Pet. App. at 88a-92a (Compl. ¶¶ 14-35).

The Complaint almost exclusively alleged misdeeds by Mohawk or its employees unrelated to any RICO enterprise. For example, plaintiffs alleged that "Mohawk has accepted for employment ... workers that it knew or had reason to know were not authorized to work in the United States"; that "Mohawk has knowingly and recklessly accepted" obviously false documentation for employees; that "Mohawk supervisors have encouraged ... employees to ... [illegally] reapply for work at Mohawk"; that "Mohawk employees and/or supervisors have destroyed eligibility documents" to conceal Mohawk's employment of illegal workers; that "Mohawk employees have traveled to the United States border ... to recruit undocumented aliens"; and that "Mohawk employees and supervisors have assisted illegal workers in attempting to evade detection by law enforcement." Pet. App. at 88a-89a, 91a (Compl. ¶¶ 15-18, 20, 22, 28).[2]

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[1] While the allegations in the Complaint must be taken as true at this stage, Fed. R. Civ. Proc. 12(b)(6), Mohawk vigorously denies any illegal conduct.

[2] The Complaint set forth five alleged RICO predicate acts: (1) knowingly hiring more than 10 illegal aliens during a 12-month period, in violation of 8 U.S.C. § 1324(a)(3)(A); (2) harboring illegal aliens, in violation of 8 U.S.C. § 1324(a)(1)(A)(iii); (3) encouraging illegal aliens to enter the United States, in violation of 8 U.S.C. § 1324(a)(1)(A)(iv);

In an attempt to satisfy § 1962(c)'s requirement that the defendant conduct the affairs of a distinct "enterprise" (and not just its own affairs), plaintiffs alleged that Mohawk had participated in "an association-in-fact enterprise with third party employment agencies and other recruiters." Pet. App. at 101a (Compl. ¶ 76). In particular, plaintiffs alleged that these third-party recruiters supplied illegal workers to Mohawk and that Mohawk paid the recruiters a fee for each worker they supplied. See *id.* Plaintiffs asserted without explanation that Mohawk participated in the operation and management of the affairs of this "enterprise." *Id.* (Compl. ¶¶ 77, 78). Plaintiffs further asserted that the enterprise "exists for Mohawk's benefit." *Id.* (Compl. ¶ 78). Plaintiffs did not name any participants in this supposed "enterprise" other than Mohawk and its employment recruiters.

Plaintiffs asserted that they "have suffered an injury to their 'business or property,' *i.e.* lost wages, as a direct result of Mohawk's violation of federal RICO." Pet. App. at 103a (Compl. ¶ 86); see 18 U.S.C. § 1964(c) (civil RICO plaintiffs must be "injured in [their] business or property by reason of a violation of section 1962"). According to plaintiffs, the wages that Mohawk pays (and that plaintiffs accepted) are "depressed" by Mohawk's alleged misconduct. See Pet. App. at 91a-92a (Compl. ¶ 33) ("Mohawk's employment and harboring of large numbers of illegal workers has enabled Mohawk to depress wages and thereby to pay all of its hourly employees ... wages that are lower than they would be if Mohawk did not engage in this illegal conduct."). This depression supposedly occurs because Mohawk's employment of undocumented workers effects an "unlawful expansion of the labor pool" in north Georgia that "permit[s]

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(4) accepting false identification documents, in violation of 18 U.S.C. § 1546(a); and (5) using false identification documents, in violation of 18 U.S.C. § 1546(b). *See* Pet. App. at 97a-99a. *See also* 18 U.S.C. § 1961(1)(B), (F) (providing that violations of 8 U.S.C. § 1324 and 18 U.S.C. § 1546 constitute "racketeering activity" for RICO purposes).

Mohawk to depress the wages that it pays all its hourly employees." *Id.* at 92a (Compl. ¶ 35). The Complaint offered no explanation for how Mohawk could pay below-market wages and retain its workforce, nor did it claim that Mohawk had sufficient market power to depress wages throughout Georgia. Instead, plaintiffs merely alleged generally that Mohawk's employment of "hundreds" of illegal aliens somehow depressed the wages of the millions of workers in Georgia. *Id.* at 98a (Compl. ¶ 61).

2. Mohawk moved to dismiss all four counts of the complaint, arguing *inter alia* that respondents had failed to plead a legally sufficient RICO enterprise and that they had not pled a direct injury to business or property proximately caused by the alleged predicate acts.[3] The district court denied Mohawk's motion to dismiss the federal and Georgia RICO claims.[4] Pet. App. at 69a. The district court, however, granted Mohawk's motion to certify an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) and stayed discovery pending resolution of the appeal. Pet. App. at 74a. The court found that there was "substantial ground for difference of opinion" both as to whether plaintiffs had pled an adequate RICO enterprise and as to whether they had pled sufficient proximately caused direct injury to business or property, and concluded that these issues merited immediate review. *Id.* at 72a-73a.

3. The Eleventh Circuit accepted the certification, Pet. App. at 75a, and affirmed the district court's denial of

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[3] Georgia courts have followed federal RICO caselaw when interpreting the scope of proximate cause for the Georgia RICO statute. *See Maddox v. Southern Eng'g Co.*, 500 S.E.2d 591, 594 (Ga. Ct. App. 1998).

[4] The district court partially granted Mohawk's motion to dismiss the unjust enrichment claim, dismissing plaintiffs' claim for unjust enrichment based on Mohawk's supposed benefit from workers' compensation savings. Pet. App. at 69a.

Mohawk's motion to dismiss the federal and Georgia RICO claims.[5] *Williams I*, 411 F.3d at 1266.

4. Mohawk filed a petition for certiorari on October 7, 2005, requesting review on two questions: (1) whether Mohawk, together with its agents, can constitute an enterprise under RICO, and (2) whether plaintiffs pled direct injuries to business or property. Mohawk Cert. Pet. at *i, *Mohawk Indus., Inc.* v. *Williams*, 126 S. Ct. 830, 2005 WL 2566486 (Oct. 7, 2005). This Court granted certiorari limited to the first question on December 12, 2005. See Pet. App. at 30a. That question was briefed on the merits and was argued on April 26, 2006.

On June 5, 2006, this Court issued its opinion in *Anza*. That same day, the Court issued an order dismissing its partial grant of certiorari as improvidently granted, granting certiorari without limitation, vacating *Williams I*, and remanding to the Eleventh Circuit for reconsideration in light of *Anza*. See Pet. App. at 31a. Petitioner's reply brief had proposed precisely this course of action if the Court were to decide the causation issue in *Anza* in the way that it did. Pet. Reply at *13 n.10, *Mohawk Indus., Inc.* v. *Williams*, 126 S. Ct. 830, 2006 WL 951123 (Apr. 11, 2006).

5. On remand, the Eleventh Circuit ordered supplemental briefing on the RICO claim limited to the impact of *Anza* and reaffirmed (*Williams II*).[6] Rather than faithfully apply *Anza*'s

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[5] The Eleventh Circuit reversed the district court's judgment on the unjust enrichment claims in part, holding that plaintiffs' unjust enrichment claim should have been dismissed in its entirety because plaintiffs contracted for the wages they received. *Williams I*, 411 F.3d at 1266.

[6] The briefing limitation was prompted by plaintiffs' request that the Eleventh Circuit preclude supplemental briefing on "the enterprise issues that Mohawk unsuccessfully argued to the Supreme Court." Appellees' Resp. to Mohawk Indus., Inc.'s Mot. for Leave to File Supplemental Briefing at 4, *Williams* v. *Mohawk Indus., Inc.*, No. 04-13740-AA (11th Cir. filed Jul. 7, 2006). Mohawk opposed the limitation, noting that the

direct injury guidance and determine whether the claimed injury was caused by actions "entirely distinct" from the claimed RICO violation, the court of appeals recited verbatim the paragraphs from *Williams I* in reiterating its holding that "the plaintiffs have alleged sufficient proximate cause." Compare Pet. App. at 16a, with *Williams I*, 411 F.3d at 1261-62. The Eleventh Circuit purported to distinguish *Anza*, asserting that there was a "correlation between illegal hiring and lower wages," Pet. App. at 18a, and suggesting that plaintiffs' allegations about the "purpose and intended effect" of Mohawk's supposed illegal hiring were sufficient, *id.* at 16a. The Eleventh Circuit also claimed that "the concerns expressed in *Anza*" only apply where another directly injured party could bring a RICO civil suit. *Id.* at 18a-19a.

The Eleventh Circuit also upheld the legal sufficiency of the enterprise allegations. The Eleventh Circuit held that a plaintiff could survive a motion to dismiss by alleging an "enterprise" consisting of any "loose or informal association of distinct entities." Pet. App. at 8a (internal quotation marks omitted). The court further held that the plaintiffs' general allegation that "Mohawk participates in the operation and management of the affairs of the enterprise" was sufficient participation in the conduct of a distinct enterprise. *Id.* at 9a-10a (internal quotation marks omitted).

The Eleventh Circuit candidly acknowledged that its enterprise "conclusion puts our circuit in conflict with the Seventh Circuit's decision in *Baker v. IBP, Inc.*" Pet. App. at 10a. In *Baker*, the Seventh Circuit confronted materially identical allegations.[7] That court, however, held that the

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court may wish to reconsider *en banc* circuit precedent holding that a corporation may be a member of an association-in-fact enterprise.

[7] In *Baker*, the plaintiffs alleged that the defendant corporation was violating immigration laws by employing illegal aliens—and, like plaintiffs here—claimed that the RICO enterprise consisted of the defendant corporation and third parties that assisted in recruiting employees.

enterprise allegations were legally flawed: allegations that a corporate defendant was unlawfully hiring its workers did not constitute the requisite participation in a separate enterprise—they only amounted to a claim that the corporation was "operat[ing] *itself* unlawfully." *Baker* v. *IBP, Inc.*, 357 F.3d 685, 691 (7th Cir. 2004) (Easterbrook, J.). The Eleventh Circuit rejected this analysis, claiming that it was "possible" for plaintiffs to establish that Mohawk operated or managed the supposed "enterprise" of Mohawk and its recruiters. Pet. App. at 12a. The Eleventh Circuit did not explain how this could be "possible" or how Mohawk's hiring of its own employees constituted the operation or management of the affairs of a distinct enterprise—as opposed to Mohawk's own affairs.

Finally, the Eleventh Circuit concluded that plaintiffs' bid for a retroactive wage increase was a cognizable interest under RICO. Pet. App. at 12a-13a. According to the Eleventh Circuit, plaintiffs have a "'legal entitlement to business relations unhampered by the RICO predicate statutes,'" which confers civil standing under § 1964(c). *Id.* at 13a (quoting *Mendoza* v. *Zirkle Fruit Co.*, 301 F.3d 1163, 1168 n.4 (9th Cir. 2002)).

6. On October 18, 2006, Mohawk filed a petition for rehearing en banc, specifically asking the Court to review the panel's interpretation of *Anza* and to reconsider preexisting Eleventh Circuit precedent holding that corporations may be constituent members of an association-in-fact enterprise. The Eleventh Circuit denied the petition on November 22, 2006. Pet. App. at 77a.

REASONS FOR GRANTING THE PETITION

I. THE ELEVENTH CIRCUIT IGNORED THIS COURT'S HOLDING IN *ANZA*.

Last Term, this Court vacated the Eleventh Circuit's prior decision in this case and remanded with instructions to

reconsider in light of this Court's *Anza* decision. The Eleventh Circuit failed to follow the Court's direction to apply *Anza*'s holding to this case, and instead reaffirmed its prior ruling on bases that *Anza* squarely rejects and caused an immediate split with the Seventh Circuit over the interpretation of the direct injury requirement after *Anza*.

In *Anza*, plaintiff Ideal Steel Supply Corp. ("Ideal") brought a RICO action against its competitor National Steel Supply, Inc. ("National") and National's owner-operators Joseph and Vincent Anza. Plaintiff alleged that National unlawfully failed to charge state sales tax to customers that paid in cash. *Anza*, 126 S. Ct. at 1994. Plaintiff alleged that this amounted to state tax fraud and permitted National effectively to cut its prices. See *id.* at 1995. Ideal pled that its lost sales were "direct[ly]" caused by this racketeering scheme. Am. Compl. ¶ 1, *Ideal Steel Supply Corp.* v. *Anza*, 02 Civ. 4788 (RMB) (S.D.N.Y. Sept. 13, 2002), *available at* 2006 WL 122082, at *5-20 (hereafter "*Anza* Complaint") ("[T]he intent and direct effect of [the RICO violation] is to cause Ideal, National's principal competitor, to lose a substantial part of its business to National.").[8] Significantly, Ideal's injury was not a derivative or passed-on injury; it alleged an injury that was entirely its own. See *Anza*, 126 S. Ct. at 1997 ("Ideal asserts it suffered *its own* harms when the Anzas failed to charge customers for the applicable sales tax" (emphasis added)).

This Court held that Ideal failed to plead a proximately-caused direct injury cognizable under RICO. See *id.* at 1997-

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[8] Ideal's complaint extensively detailed each step of the causal chain between National's tax fraud and Ideal's claimed losses. Ideal pled that it and National were sole competitors and that they "compete primarily on the basis of price." *Anza* Compl. ¶¶ 19-22. National's tax fraud enabled it to cut the effective price of its products by 8.25%, and this illegal discount gave National a "competitively significant price advantage over Ideal." *Id.* ¶¶ 32-34. This price advantage caused a "steep drop in taxable cash sales" at Ideal's facilities, which "can only be explained by National's unlawful price advantage." *Id.* ¶¶ 35-36.

98. Critically, this Court did not hold that plaintiff's theory of causation was illogical—it was perfectly logical that the reduction of effective prices by 8.25% (the amount of New York's sales tax) could cause customers to switch steel suppliers. Instead, *Anza* held that RICO's direct injury requirement demands more than logic. The "central question" in evaluating whether a RICO plaintiff has pled a direct injury is "whether the alleged RICO violation led directly to the plaintiff's injuries." *Id.* at 1998. Under this analysis, Ideal's alleged injury was indirect, because "[t]he cause of Ideal's asserted harms ... is a set of actions (offering lower prices) entirely distinct from the alleged RICO violation (defrauding the State)." See *id.* at 1997. In short, RICO requires that the alleged injury be immediately caused by the RICO violation and not be dependent upon some other intervening choice or action.

This Court explained that its indirect-injury conclusion was confirmed by two "discontinuit[ies]" between the cause of Ideal's asserted harms and the alleged predicate acts. *Id.* First, National "could have lowered its prices for any number of reasons unconnected to the asserted pattern of fraud." *Id.* ("[T]he fact that a company commits tax fraud does not mean the company will lower its prices; the additional cash could go anywhere."). Second, Ideal's alleged injury "could have resulted from factors other than" National's decreased prices. *Id.* This Court reasoned that "[b]usinesses lose and gain customers for many reasons, and it would require a complex assessment to establish what portion of Ideal's lost sales were the product of National's decreased prices." *Id.* It concluded that the direct injury requirement "is meant to prevent these types of intricate, uncertain inquiries from overrunning RICO litigation." *Id.* at 1998.

The instant case has identical defects which are patently apparent. Indeed, last Term this Court vacated and remanded this case for reconsideration in light of *Anza*. Plaintiffs in this case allege that Mohawk paid them a depressed wage because

Mohawk allegedly hired other undocumented workers. But under *Anza*, Mohawk's conduct with respect to *other* parties does not cause a *direct* injury to the plaintiffs. As in *Anza*, "[t]he cause of [plaintiffs'] asserted harms ... is a set of actions [(payment of lower wages)] entirely distinct from the alleged RICO violation [(hiring unauthorized workers)]." *Id.* at 1997.

Likewise, this fundamental flaw is confirmed by the same two principal factors set forth in the *Anza* decision. First, just as the defendant in *Anza* "could have lowered its prices for any number of reasons unconnected to the asserted pattern of fraud," Mohawk could have set plaintiffs' wages based upon a host of economic, business, and competitive reasons unrelated to its alleged hiring of unlawful workers. *Id.* Second, as in *Anza*, simply because a company "commits [immigration violations] does not mean the company will lower its [wages]." *Id.* As a result, the Eleventh Circuit's decision permits precisely the types of "speculative" and "intricate" causation inquiries that this Court has sought to exclude from RICO litigation.

In reaching its decision, the Eleventh Circuit misread this Court's *Anza* opinion in two critical respects. First, the court held that the direct injury requirement is met because of a "correlation between illegal hiring and lower wages."[9] Pet. App. at 18a. But a mere correlation is not enough to sustain a RICO claim. If it were, then Ideal's injury in *Anza* would have been direct, for there certainly could be a correlation

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[9] The Eleventh Circuit found support for this correlation in *DeCanas* v. *Bica*, 424 U.S. 351 (1976). Pet. App. at 17a-18a. But *DeCanas* had nothing to do with RICO or its direct injury requirement—instead it dealt only with state police power to regulate the employment of illegal aliens. 424 U.S. at 356-57. The notion that there is a relationship between illegal hiring and lower wages that is sufficient to justify a State's enactment of laws of general applicability does not remotely support the notion that there is a sufficiently *direct* injury to one set of employees resulting from a single employer's hiring decisions with respect to employees.

between lost sales and its sole competitor's effective price cuts. Instead, *Anza* requires an assessment of whether the RICO violation is the action immediately causing the alleged injury. Despite the *Anza* decision's efforts to emphasize this point, the Eleventh Circuit ignored this critical holding of *Anza*.

Moreover, the court of appeals' claim that "*Anza*'s concern about speculative damages, 'intricate, uncertain injuries,' and unwieldy apportionment are not implicated in this case" is baffling. *Id.* at 19a. Here, plaintiffs must show that they would have received some hypothetical higher wage rate if Mohawk had not engaged in the alleged unlawful hiring. But numerous "factors other than [Mohawk's] alleged acts of fraud" affect the wages that an employer pays—including the overall health of the national and local economies, the profitability of the carpet industry, competition for labor from other Georgia employers, and the individual skills and productivity of each worker. *Anza*, 126 S. Ct. at 1997. These inherent complications in plaintiffs' claim for depressed wages confirm the indirect nature of the injury alleged.

The Eleventh Circuit also rested its holding of a direct injury upon a basis that *Anza* held to be impermissible. The Eleventh Circuit repeatedly noted that a direct injury existed because plaintiffs specifically pled that Mohawk's "hiring and harboring of illegal workers has the purpose and direct result of depressing the wages paid to the plaintiffs." Pet. App. at 17a, 23a-24a. This reliance on the averments of a "purpose" to injure plaintiffs and on conclusory allegations of "directness" flatly contradicts *Anza*. In fact, the *Anza* plaintiff made identical allegations—that "[t]he purpose and direct effect" of the defendants' tax fraud was to cause the alleged RICO injury. See *Anza* Compl. ¶ 32. This Court rejected the adequacy of such allegations, concluding that a "RICO plaintiff cannot circumvent the proximate-cause requirement

simply by claiming that the defendant's aim was to [cause the alleged injury]." *Anza*, 126 S. Ct. at 1998.[10]

The Eleventh Circuit's interpretation of *Anza* has already created a new circuit split. In contrast to the Eleventh Circuit, the Seventh Circuit has applied *Anza* to bar complaints alleging injuries that were not directly caused by the RICO violation. In *James Cape & Sons Co.* v. *PCC Construction Co.*, the plaintiff ("Cape") alleged that the defendant construction companies conspired to learn the amount of Cape's bids for state contracts, used this knowledge "to unfairly manipulate the bidding process by underbidding Cape by small increments," and thereby caused Cape to lose bids and business. 453 F.3d 396, 398 (7th Cir. 2006). The Seventh Circuit held that there was no direct injury because "[a] court could never be certain whether Cape would have won any of the contracts that were the subject of the conspiracy 'for any number of reasons unconnected to the asserted pattern of fraud.'" *Id.* at 403 (quoting *Anza*, 126 S. Ct. at 1997). The Eleventh Circuit's holding in the instant case, however, would have permitted Cape's suit to proceed, for there certainly could be a "correlation" between the defendants' bid manipulation violations and Cape's alleged damages.

In short, the Eleventh Circuit has adopted a cramped interpretation of *Anza* that robs the direct injury requirement of its important gatekeeping function: confining RICO litigation to cases where the victim seeks redress for an injury directly caused by the racketeering activity. The Eleventh Circuit's decision continues to permit creative plaintiffs to

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[10] In addition, the Eleventh Circuit misread *Anza* to hold that dismissal is inappropriate where "[t]here is no more direct injured party who could bring suit." Pet. App. at 19a. This reflects a fundamental misunderstanding of *Anza*. The issue is not whether there is another (or "more direct") victim. Instead, the issue is whether the RICO violation immediately causes the injury or whether instead the direct cause of injury is distinct from the alleged violation. *Anza*, 126 S. Ct. at 1997.

plead RICO claims that are far-fetched and far afield from RICO's core purposes.

The Eleventh Circuit's failure to heed *Anza* in the wake of this Court's explicit instruction to do so warrants certiorari. This Court has often granted certiorari after a lower court fails correctly to interpret a decision that it was instructed to consider in an order granting certiorari, vacating the previous opinion, and remanding for reconsideration. See, *e.g.*, *DeBuono* v. *NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 812 (1997); *Harper* v. *Virginia Dep't of Taxation*, 509 U.S. 86, 94 (1993).

II. THIS COURT SHOULD RESOLVE THE CIRCUIT SPLIT ON WHETHER A DEFENDANT CORPORATION AND ITS AGENTS ACTING ON ITS BEHALF CAN CONSTITUTE A DISTINCT ASSOCIATION-IN-FACT ENTERPRISE.

The second critical issue presented by this case is an issue that this Court has already recognized as warranting its attention: whether a corporate defendant can conduct or participate in the conduct of the affairs of a RICO "enterprise" comprised solely of the corporation and its non-employee agents performing tasks for the corporation. Last Term, this Court initially granted certiorari in this case to resolve the deep divide amongst the courts of appeals on this issue. That divide has since widened. The Eleventh Circuit's holding that the enterprise allegations here are sufficient parallels similar holdings in the Sixth and Ninth Circuits. The Second, Third, and Seventh Circuits disagree, holding that such "associations-in-fact" are indistinct from the corporations themselves. Indeed, the Eleventh Circuit itself acknowledged that its decision that a manufacturer and its employment recruiters could comprise an association-in-fact enterprise "puts our circuit in conflict" with the Seventh Circuit's construction of the enterprise requirement in a materially identical case. Pet. App. at 10a. This Court should again grant certiorari to resolve this question.

Section 1962(c) makes it "unlawful for any person employed by or associated with any enterprise ... to conduct or participate ... in the conduct of such enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. § 1962(c). The statute contemplates "two distinct entities: (1) a 'person'; and (2) an 'enterprise' that is not simply the same 'person' referred to by a different name." *Cedric Kushner Promotions, Ltd.* v. *King*, 533 U.S. 158, 161 (2001). Plaintiffs proceeding under § 1962(c), therefore, must plead and prove an enterprise that is distinct from the defendant. Thus, a RICO plaintiff cannot sue a corporation and name that same corporation as the RICO enterprise. Relatedly, plaintiffs must show that a defendant "conducted or participated in the conduct of the '*enterprise's* affairs,' not just [its] *own* affairs." *Reves* v. *Ernst & Young*, 507 U.S. 170, 185 (1993).

In the wake of *Cedric Kushner* and *Reves*, plaintiffs have creatively pled around these requirements by suing a corporation and naming as a "distinct" enterprise an association in fact consisting of the corporation and other agents with which it contracts.[11] Grappling with this issue, the courts of appeals generally have recognized that a defendant corporation's association with its own employees does not form an enterprise distinct from the corporation

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[11] The *Cedric Kushner* Court took note of this type of an enterprise, stating that a purported "enterprise" comprised of a corporation and its employees and agents would be an "oddly constructed entity" and noting it would present "quite different circumstances" than the enterprise in *Cedric Kushner*. 533 U.S. at 164. *Cedric Kushner* itself involved an individual who was president and sole shareholder of a closely held corporation and who was accused of conducting the affairs of that corporation (the alleged RICO "enterprise") through a pattern of racketeering. *See id.* at 160. This Court held that the defendant, as an individual, was distinct from the corporation he controlled. *See id.* at 163. Indeed, *Cedric Kushner* presented a classic RICO fact pattern—an individual defendant using an organization (the RICO enterprise) for criminal purposes.

itself.[12] The circuits, however, have divided over whether a corporation and non-employee agents performing tasks for the corporation form a distinct RICO enterprise.

The Eleventh Circuit in the decision below and the Sixth and Ninth Circuits have concluded that an enterprise can be pled adequately so long as the corporation and the agents in the alleged "enterprise" are "distinct entities," even if those agents are merely performing services for the corporation. The "distinct entities" test used by the Eleventh Circuit in the instant case, see Pet. App. at 8a, 9a, mirrors the Sixth Circuit's test in *Davis* v. *Mutual Life Insurance Co.*, 6 F.3d 367, 377 (6th Cir. 1993).

The Ninth Circuit recently joined the Sixth and Eleventh Circuits in holding that an enterprise can consist of a corporation and non-employee agents working on its behalf. *Living Designs, Inc.* v. *E.I. DuPont De Nemours & Co*, 431 F.3d 353 (9th Cir. 2005), *cert. denied*, 126 S. Ct. 2861 (2006).

By contrast, the Second, Third, and Seventh Circuits have held that because a corporation necessarily acts through agents, an "enterprise" consisting of a defendant corporation and agents acting on its behalf do not constitute an enterprise distinct from the corporation itself. See *Baker*, 357 F.3d at 691-92; *Fitzgerald* v. *Chrysler Corp.*, 116 F.3d 225, 228 (7th Cir. 1997) (Posner, C.J.); *Discon, Inc.* v. *NYNEX Corp.*, 93 F.3d 1055, 1064 (2d Cir. 1996); *Brittingham* v. *Mobil Corp.*, 943 F.2d 297, 303 (3d Cir. 1991). These courts have reasoned that because a corporation can act only through agents, an "enterprise" of a defendant and entities acting on its behalf "is in reality no more than the defendant itself." *Riverwoods Chappaqua Corp.* v. *Marine Midland Bank, N.A.*, 30 F.3d 339, 344 (2d Cir. 1994); see *Fitzgerald*, 116 F.3d at 228; *Discon*, 93 F.3d at 1064; *Brittingham*, 943 F.2d at 303.

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[12] *See, e.g., Riverwoods Chappaqua Corp.* v. *Marine Midland Bank, N.A.*, 30 F.3d 339, 344 (2d Cir. 1994); *Old Time Enters., Inc.* v. *International Coffee Corp.*, 862 F.2d 1213, 1217 (5th Cir. 1989).

In *Fitzgerald* the Seventh Circuit found that the defendant Chrysler's association with its "affiliates and agents" was not a separate enterprise. 116 F.3d at 226 (Posner, C.J.). The *Fitzgerald* plaintiffs alleged that Chrysler had engaged in a scheme fraudulently to deny warranty protection to consumers, and that it carried out this scheme through an "association-in-fact" enterprise with Chrysler dealerships. See *id.* The Seventh Circuit held that this supposed enterprise was not distinct from Chrysler itself. See *id.* at 228. The court recognized the illogic in applying RICO liability to a corporation using outside agents when no liability would attach for the corporation's use of its own employees in the same way: "we cannot imagine ... applying RICO to a free-standing corporation such as Chrysler merely because Chrysler does business through agents, as virtually every manufacturer does." *Id.* at 227.

The Second Circuit has reached similar conclusions. In *Riverwoods*, the Second Circuit held that "a RICO enterprise that consists merely of a corporate defendant associated with its own employees or agents carrying on the regular affairs of a defendant" is not distinct from the corporate defendant. 30 F.3d at 344. The Second Circuit later followed the same rule in *Discon* to hold that a corporation and third parties working on its behalf could not form an enterprise. In *Discon*, the plaintiffs alleged that the enterprise consisted of several entities within a single corporate structure and their "attorneys, accountants and other agents." 93 F.3d at 1064 (internal quotation marks omitted). The Second Circuit concluded that this enterprise was indistinguishable from the corporation itself; neither a corporation's "agents" nor its "employees" were distinct from the corporation "so long as those persons act on behalf of the corporation." *Id.*[13]

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[13] This Court's decision in *NYNEX Corp.* v. *Discon, Inc.*, 525 U.S. 128 (1998), reversed the Second Circuit's decision only as to the plaintiffs' Sherman Act claims; this Court did not review the Second Circuit's decision on the RICO claims. *Id.* at 133.

The Third Circuit has followed suit, holding that an "enterprise" consisting of a defendant corporation and advertising agencies acting on its behalf is not distinct from the corporation itself. See *Brittingham*, 943 F.2d at 302. In *Brittingham* the court explained that a corporate defendant is differently situated from an individual defendant accused of manipulating his corporate employer; "when a defendant is itself a collective entity, it is more likely that the alleged enterprise is in reality no different from the association of individuals or entities that constitute the defendant or carry out its actions." *Id.* at 302.[14]

The Eleventh Circuit recognized this conflict as applied to the particular facts of this case, stating that the decision below "puts our circuit in conflict with the Seventh Circuit's decision in *Baker v. IBP, Inc.*" Pet. App. at 10a. The *Baker* case involved allegations that are almost identical to the allegations in the instant case. The *Baker* plaintiffs alleged an enterprise consisting of "IBP plus the persons and organizations who help it find aliens to hire." 357 F.3d at 691. The *Baker* court rejected these allegations as insufficient. The conflict with the holding below could not be more plain. For the same reasons the Court granted review last Term, it should do the same now.

In addition, the Court should grant review here to consider an antecedent misinterpretation of RICO's enterprise definition that has gained wide acceptance among lower courts, but is clearly wrong: the flawed view that a corporation can be a member of an association-in-fact

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[14] The Third Circuit later overruled a different portion of *Brittingham*, which addressed application of § 1962(c) to "officers and employees acting through a corporate enterprise," *see Jaguar Cars, Inc.* v. *Royal Oak Motor Car Co.*, 46 F.3d 258, 266, 268-69 (3d Cir. 1995). *Jaguar Cars* did not alter *Brittingham*'s holding that a defendant corporation and its third-party agents could not constitute a RICO enterprise. *See id.* at 268.

enterprise.[15] RICO's definition provides that "'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of *individuals* associated in fact although not a legal entity." 18 U.S.C. § 1961(4) (emphasis added). It is plain—both from ordinary meaning and structure of the statute itself—that the "group of *individuals* associated in fact" refers only to groups of natural persons, not groups of corporations. See *Webster's Third International Dictionary of the English Language* 1152 (1969) (defining "individual" as "a single human being as contrasted with a social group or institution"); 18 U.S.C. § 1961(4) (listing at outset of definition "individual" separately from other entities, including "corporation).[16] Indeed, when confronted with this issue last Term, the United States did not defend the Eleventh Circuit's holding that corporations were "individuals" within the meaning of RICO's enterprise definition. See Br. of United States as Amicus Curiae at *6, *Mohawk Indus., Inc.* v. *Williams*, 2006 WL 680358 (Mar. 16, 2006).

Instead, the focus last Term was on whether the definition of "enterprise"—in light of its introduction by the term

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[15] The reasons why this view is flawed, though summarized below, are set forth more fully in the merits briefs in this case from last Term. *See* Pet. Br. at *12-26, *Mohawk Indus., Inc.* v. *Williams*, 126 S. Ct. 2016, 2006 WL 282167 (2006) (No. 05-465); Pet. Reply at *1-8, *Mohawk*, 2006 WL 951123.

[16] At oral argument in this case last Term, Chief Justice Roberts commented that "it does seem kind of strange to encompass [corporations] under the term individuals when the same statute uses individuals and corporations separately." Tr. Oral Arg. at 29, *Mohawk Indus., Inc.* v. *Williams*, 126 S. Ct. 2016 (2006) (No. 05-465). *See also id.* at 32 (Kennedy, J.) ("A person is defined – in sub (3) just above it. A person includes any individual or entity. Then the next thing [§ 1961(4)] says individual. So it's not a—it doesn't sound like a corporation."); *id.* at 51 (Souter, J.) (noting the "peculiarity of the definition" of enterprise, which lists "A, B, C, and D, and then it repeats one, but only one, of the items on the list and says groups of these items, i.e., individuals, are included").

"includes"—was comprehensive or instead merely provided a list of examples that could be judicially expanded upon. As this Court has recognized, "the term 'includes' may sometimes be taken as synonymous with 'means,'" and thus as introducing a comprehensive list. *Helvering* v. *Morgan's, Inc.*, 293 U.S. 121, 125 (1934). The structure of RICO provides powerful evidence that Congress used "includes" to introduce comprehensive definitions.[17]

A reading of § 1961(4) to mean what it says accords with the "two aims" of RICO: "to make it unlawful for *individuals* to function as members of organized criminal groups" and "to stop organized crime's infiltration of legitimate businesses." S. Alito, Jr., *Racketeering Made Simple(r), in The RICO Racket* 1, 3-4 (G. McDowell ed., 1989) (emphasis added). Expanding the meaning of "group of individuals" to encompass corporations takes RICO well beyond these purposes. Such an expansion threatens to "RICO-ize, with its treble damages and private plaintiffs and everything, vast amounts of ordinary commercial activity." Tr. Oral Arg. at 44-45, *Mohawk*, 126 S. Ct. 2016 (2006) (Breyer, J.) (No. 05-465).

The circuit courts' rationales for "RICO-izing" groups of corporations are thoroughly unpersuasive. For instance, the Eleventh Circuit has baldly held that "a group of corporations can be a 'group of individuals associated in fact.'" *United States* v. *Navarro-Ordas*, 770 F.2d 959, 969 n.19 (11th Cir. 1985). See also *United States* v. *Feldman*, 853 F.2d 648, 655-56 (9th Cir. 1988). Others have grafted language onto § 1961(4) that is plainly not there. See *Bunker Ramo Corp.* v.

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[17] Justice Alito commented on this point at oral argument, asking: "Why shouldn't includes here be read to mean means when that seems to be the way it's used in other subsections of this provision and when the only thing that seems to be ... omitted from the list is what's involved here, which is a group consisting of a corporation or ... other legal entity ... and natural persons." Tr. Oral Arg. at 42, *Mohawk*, 126 S. Ct. 2016 (No. 05-465).

United Bus. Forms, Inc., 713 F.2d 1272, 1285 (7th Cir. 1983) (adding to end of enterprise definition "and any combination of them"); *United States* v. *Thevis*, 665 F.2d 616, 625 (5th Cir. 1980) (approving of "enterprise" consisting of "'a group of individuals associated in fact with various corporations'"). Other courts have simply relied on the term "includes"—without any analysis of whether "includes" was used elsewhere in RICO to introduce comprehensive definitions. See, *e.g.*, *United States* v. *Masters*, 924 F.2d 1362, 1366 (7th Cir. 1991); *Thevis*, 665 F.2d at 625; *United States* v. *Perholtz*, 842 F.2d 343, 354 (D.C. Cir. 1988); *United States* v. *Huber*, 603 F.2d 387, 394 (2d Cir. 1979).

Throughout this litigation, petitioner has contended that the enterprise alleged is legally deficient. Indeed, petitioner specifically asked the Eleventh Circuit to rehear this case en banc to reconsider long-established, but deeply flawed, precedents holding that an association-in-fact enterprise may consist of a group with a corporation as a constituent member. See Pet. App. at 81a-83a (requesting reconsideration of *Navarro-Ordas*, 770 F.2d at 969 n.19 and *United States* v. *Goldin Indus., Inc.*, 219 F.3d 1271, 1275 (11th Cir. 2000)).[18]

The courts of appeals may be unanimous on this point, but they are unanimously wrong and their reasoning does not withstand scrutiny. As a result, numerous civil suits—most of which result in strike suit settlements—are predicated upon a theory that lacks support in the statute. This Court should grant certiorari to correct this misinterpretation of RICO and

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[18] That Mohawk is appealing pursuant to 28 U.S.C. § 1292(b) is of no moment. The district court specifically granted Mohawk permission to file an interlocutory appeal concerning whether "Plaintiffs had adequately alleged the existence of a RICO enterprise." Pet. App. at 70a. *See also Yamaha Motor Corp.* v. *Calhoun*, 516 U.S. 199, 205 (1996) ("the appellate court may address any issue fairly included within the certified order because 'it is the *order* that is appealable, and not the controlling question identified by the district court'" (quoting 9 J. Moore & B. Ward, *Moore's Federal Practice* ¶ 110.25[1], at 300 (2d ed. 1995))).

restore "association-in-fact" enterprises to the scope Congress intended.

III. A CLAIM FOR SUPPRESSED WAGES IS NOT AN INJURY TO "BUSINESS OR PROPERTY" UNDER RICO.

The Eleventh Circuit's decision also raises a third important issue concerning the meaning of injury to "business or property." Under RICO, only a "person injured in his business or property by reason of a [RICO] violation" has standing to bring a civil claim. 18 U.S.C. § 1964(c). See *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 496 (1985) ("[T]he plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation.").

Plaintiffs in this case claim that their allegedly depressed wages constitute an injury to "their *property* by reason of Mohawk's violations of 18 U.S.C. § 1962(c)." Pet. App. at 104a (Compl. ¶ 90) (emphasis added). The lower courts have divided four to one over whether an hourly wage injury constitutes an injury to "business or property." Below, the Eleventh Circuit joined the Second and Ninth Circuits and the Washington Supreme Court in holding that such injuries do give rise to civil RICO standing. See Pet. App. at 12a-13a (allegations of depressed wages constitute injury to business); *Mendoza* v. *Zirkle Fruit Co.*, 301 F.3d 1163, 1168 (9th Cir. 2002) (allegations of depressed wages constitute injury to property); *Diaz* v. *Gates*, 420 F.3d 897, 898 (9th Cir. 2005) (en banc), *cert. denied*, 126 S. Ct. 1069 (2006) (finding "lost employment, employment opportunities, and … wages" from false imprisonment an injury to property); *Jund* v. *Town of Hempstead*, 941 F.2d 1271, 1286 (2d Cir. 1991) (upholding a damages award for "lost wages" related to demotion); *Rice* v.

Janovich, 742 P.2d 1230, 1237 (Wash. 1987) ("loss of wages was an injury to his 'business'").[19]

In contrast, the Seventh Circuit has concluded that hourly wages are not sufficient to confer civil RICO standing. In *Evans* v. *City of Chicago*, plaintiff alleged that he had been "damaged in his 'business or property' by being falsely imprisoned ... because he lost potential income during that period of time." 434 F.3d 916, 925 (7th Cir. 2006). The Seventh Circuit rejected that view, holding that the plaintiff's "loss of income as a result of being unable to pursue employment opportunities" was "quintessentially [a] pecuniary loss[] derivative of personal injuries," which the court found did not fall within the interests protected by the terms "'business or property.'" *Id.* at 926-27. The Seventh Circuit expressly acknowledged that its decision created a circuit split, noting that its decision was "at odds with that of the ... Ninth Circuit" *en banc* decision in *Diaz* v. *Gates*. *Id.* at 930 n.26 (citing *Diaz*, 420 F.3d 897).

Further, this conflict over whether an injury to wages is sufficient to support RICO standing implicates underlying circuit conflicts over the meaning of the terms "property" and "business" in RICO § 1964(c). The Ninth Circuit has accepted allegations identical to those of plaintiffs in this case as alleging a sufficient injury to "property." In *Mendoza* v. *Zirkle Fruit Co.*, the Ninth Circuit also confronted RICO claims of hourly workers seeking to recover depressed wages stemming from allegations of unlawful hiring. The court held that the plaintiffs adequately "allege[d] an injury to their property in the form of lost wages." 301 F.3d at 1168. The Ninth Circuit rejected defendants' argument that the plaintiffs

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[19] The First Circuit has also suggested without holding that wage-related injuries suffice to establish civil RICO standing. *See Libertad* v. *Welch*, 53 F.3d 428, 437 n.4 (1st Cir. 1995) ("Plaintiffs ... could have standing to sue under RICO, if they were to submit sufficient evidence of injury to business or property such as lost wages ....").

were required "to show a 'property right' in the lost wages, by showing that they were promised or contracted for higher wages." *Id.* at 1168 n.4. According to the court, the "case does not implicate procedural due process," *id.*, an analysis of which typically relies on whether state law recognizes a property interest, see, *e.g.*, *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972). Instead, the court found—as a matter of federal law—a property right in the form of "a legal entitlement to business relations unhampered by schemes prohibited by the RICO predicate statutes." *Mendoza*, 301 F.3d at 1168 n.4. This approach is similar to that adopted by the Eighth Circuit, which has also upheld a property interest without looking to principles of state law and rejecting the defendants' contention that "whether a particular interest amounts to property ... is quintessentially a question of state law." *Bieter Co.* v. *Blomquist*, 987 F.2d 1319, 1329 n.7 (8th Cir. 1993) (citations and internal quotation marks omitted).[20]

In contrast to the Eighth and Ninth Circuits, the First and Sixth Circuits have held that state law determines the contours of "property" under RICO. The only role for federal law, according to these circuits, is to narrow (not expand) the class of interests otherwise recognized by state law that satisfy civil RICO's "property" requirement. See *Isaak* v. *Trumbull Sav. & Loan Co.*, 169 F.3d 390, 397-98 (6th Cir. 1999); *DeMauro* v. *DeMauro*, 115 F.3d 94, 96-97 (1st Cir.

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[20] Ultimately, the Eighth Circuit found an injury to property in the form of a loss of "what likely would have been the most valuable use of [plaintiff's] property." 987 F.2d at 1329. The court recognized that "the existence of a property interest" is typically controlled by state law in "takings or due process cases," *id.* at 1329 n.7, but held that plaintiff had "not suffered a taking" and rejected a theory that the plaintiff "would have to first ... acquir[e] a cognizable property right" under state law before bringing a civil RICO suit. *Id.* at 1329 n.9.

1997).[21] Thus, in evaluating a plaintiff's civil RICO claim that her husband fraudulently concealed marital assets during divorce proceedings, the First Circuit examined New Hampshire law to decide what property interest the plaintiff had in the marital assets. *DeMauro*, 115 F.3d at 96 (deciding how "much of the real property and monies described in the complaint [are] Annette's property"). Likewise, the Sixth Circuit scrutinized Ohio law in deciding what property interests plaintiffs possessed when they purchased an interest in timeshare resorts. *Isaak*, 169 F.3d at 397-98 (concluding that Ohio state law gave plaintiffs more than a contract interest including "the right to use, enjoy or dispose of land or chattels"). See also *DeMauro*, 115 F.3d at 97 (federal law will "decide whether a given interest, recognized by state law, rises to the level of 'business or property'" for purposes of § 1964(c)); *Patterson* v. *Mobil Oil Corp.*, 335 F.3d 476, 492 n.16 (5th Cir. 2003) (stating that "federal law should determine whether a given property interest, recognized by state law, rises to the level of RICO 'business or property'").

In this case, the Eleventh Circuit quoted the Ninth Circuit's holding in *Mendoza* verbatim, but did not attempt to justify it as a federally-created "property" interest. Instead, the Eleventh Circuit held that plaintiffs' allegations of depressed wages constituted an injury to their "business" because they have "'a legal entitlement to business relations unhampered by schemes prohibited by the RICO predicate statutes.'" See Pet. App. at 13a (quoting *Mendoza*, 301 F.3d at 1168 n.4). See also *Rice*, 742 P.2d at 1236 (rejecting defendants' claim that "lost wages are not recoverable").[22]

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[21] The Fifth Circuit has also endorsed this approach. *See Patterson* v. *Mobil Oil Corp.*, 335 F.3d 476, 492 n.16 (5th Cir. 2003) (relying upon, *e.g.*, *Price* v. *Pinnacle Brands, Inc.*, 138 F.3d 602, 607 (5th Cir. 1998)).

[22] The Second Circuit has also noted that it concurs with the holdings of the Eleventh Circuit and Washington Supreme Court, noting that "[e]ven were no property rights at play, we could not agree that loss of

This Court should grant certiorari to resolve the issues of whether a wage-related injury constitutes an injury to "business or property" under RICO. In so doing, this Court will have the opportunity to resolve underlying splits over the meaning of each of the two terms—"business" and "property"—that support RICO standing. Plaintiffs' alleged wage-suppression injuries are plainly not injuries to property under state law (and plaintiffs have cited no case suggesting otherwise). Nor are those injuries to a business as that term is used within RICO. Like the other questions presented in this petition, the Eleventh Circuit's contrary holding continues to ensure that RICO reaches beyond its admittedly broad scope and, with the promise of treble damages and attorneys' fees, intrudes upon labor and other business disputes that are already the province of other extensive areas of substantive law and regulation.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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employment does not injure one's 'business.'" *Hecht* v. *Commerce Clearing House, Inc.*, 897 F.2d 21, 24 n.2 (2d Cir. 1990).

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 04-13740

SHIRLEY WILLIAMS, GALE PELFREY, BONNIE JONES, LORA SISSON, individually and on behalf of a class,
Plaintiffs-Appellees,

v.

MOHAWK INDUSTRIES, INC.,
Defendant-Appellant.

Sept. 27, 2006

Appeal from the United States District Court for the Northern District of Georgia. ON REMAND FROM THE UNITED STATES SUPREME COURT

Before ANDERSON, HULL and GIBSON,* *Circuit Judges.*

PER CURIAM:

In this case, plaintiffs-appellees Shirley Williams, Gale Pelfrey, Bonnie Jones, and Lora Sisson are current or former hourly employees of defendant-appellant Mohawk Industries, Inc. ("Mohawk"). The plaintiffs filed this class-action complaint alleging that Mohawk's widespread and knowing employment and harboring of illegal workers allowed Mohawk to reduce labor costs by depressing wages for its legal

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* Honorable John R. Gibson, United States Circuit Judge for the Eighth Circuit, sitting by designation.

hourly employees and discouraging worker's-compensation claims, in violation of federal and state RICO statutes. The plaintiffs also alleged that Mohawk was unjustly enriched by the lower wages it paid, as well as the reduced number of worker's-compensation claims it paid. The district court denied in part and granted in part Mohawk's 12(b)(6) motion, and this interlocutory appeal followed.

After review and oral argument, this Court affirmed in part and reversed in part. *Williams v. Mohawk Indus., Inc.*, 411 F.3d 1252 (11th Cir.2005). Appellant Mohawk then filed an application for writ of certiorari on two questions:

> 1. Whether a defendant corporation and its agents can constitute an "enterprise" under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 ("RICO"), in light of the settled rule that a RICO defendant must "conduct" or "participate in" the affairs of some larger enterprise and not just its own affairs.
>
> 2. Whether plaintiffs state proximately caused injuries to business or property by alleging that the hourly wages they voluntarily accepted were too low.

The United States Supreme Court granted the appellant's petition for writ of certiorari "limited to Question 1 presented by the petition." *Mohawk Indus., Inc. v. Williams*, ___ U.S. ___, 126 S.Ct. 830, 163 L.Ed.2d 705 (2005).

After oral argument, however, the Supreme Court entered a summary, three-sentence order that (1) dismissed the writ as improvidently granted as to Question 1, and (2) vacated the judgment of our prior opinion and remanded the case to this Court "for further consideration in light of *Anza v. Ideal Steel Supply Corp.*, ___ U.S. ___, 126 S.Ct. 1991, 164 L.Ed.2d 720 (2006)." *Mohawk Indus., Inc. v. Williams*, ___ U.S. ___, 126 S.Ct. 2016, 164 L.Ed.2d 776 (2006).

This case is now before the Court on remand from the Supreme Court. After the remand, this Court ordered supplemental briefing as to not only *Anza*, but also the intervening decision by the Georgia Supreme Court in *Williams General Corp. v. Stone*, 280 Ga. 631, 632 S.E.2d 376 (2006). After further consideration, this Court now reinstates its prior opinion in part and modifies it in part as follows.

I. BACKGROUND

Mohawk is the second largest carpet and rug manufacturer in the United States and has over 30,000 employees. According to the plaintiffs, Mohawk has conspired with recruiting agencies to hire and harbor illegal workers in an effort to keep labor costs as low as possible.[1] For example, according to the plaintiffs' complaint, Mohawk employees have traveled to the United States Border, including areas near Brownsville, Texas, to recruit undocumented aliens that recently have entered the United States in violation of federal law. These employees and other persons have transported undocumented aliens from these border towns to North Georgia so that those aliens may procure employment at Mohawk. Mohawk has made various incentive payments to employees and other recruiters for locating workers that Mohawk eventually employs and harbors.

Furthermore, "[v]arious recruiters, including Mohawk employees, have provided housing to these illegal workers

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[1] At this point in the litigation, we must assume the facts set forth in the plaintiffs' complaint are true. *See Anza*, 126 S.Ct. at 1994 (stating that on a motion to dismiss, the court must "accept as true the factual allegations in the amended complaint"); *Marsh v. Butler County*, 268 F.3d 1014, 1023 (11th Cir.2001) (*en banc*) (setting forth the facts in the case by "[a]ccepting all well-pleaded factual allegations (with reasonable inferences drawn favorably to Plaintiffs) in the complaint as true"). Because we must accept the allegations of plaintiffs' complaint as true, what we set out in this opinion as "the facts" for Rule 12(b)(6) purposes may not be the actual facts.

upon their arrival in North Georgia and have helped them find illegal employment with Mohawk." Additionally, Mohawk knowingly or recklessly accepts fraudulent documentation from the illegal aliens.

The plaintiffs further allege that Mohawk has concealed its efforts to hire and harbor illegal aliens by destroying documents and assisting illegal workers in evading detection by law enforcement. According to plaintiffs' complaint, Mohawk takes steps to shield those illegal aliens from detection by, among other things, helping them evade detection during law enforcement searches and inspections at Mohawk's facilities.

According to the complaint, Mohawk's widespread and knowing employment and harboring of illegal workers has permitted Mohawk to reduce labor costs. Mohawk has done so by reducing the number of legal workers it must hire and, thereby, increasing the labor pool of legal workers from which Mohawk hires. This practice permits Mohawk to depress the wages it pays its legal hourly workers.

Finally, the plaintiffs allege that Mohawk is "able to save substantial sums of money" by paying its workers reduced wages. Furthermore, Mohawk knows that illegal workers are less likely to file worker's-compensation claims, and, therefore, Mohawk is able to save additional monies. According to the plaintiffs, these benefits constitute unjust enrichment under state law.

Mohawk filed a Rule 12(b)(6) motion to dismiss the plaintiffs' complaint for failure to state a claim. The district court determined that the plaintiffs had stated a claim under both federal and state RICO statutes, as well as a claim for unjust enrichment under state law for paying legal workers lower wages because of the illegal workers Mohawk employed. However, the district court dismissed the plaintiffs' unjust-enrichment claim insofar as it was based on the reduced num-

ber of worker's-compensation claims Mohawk was forced to pay.[2]

II. FEDERAL RICO CLAIMS

Pursuant to 18 U.S.C. § 1962(c), it is illegal "for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . ." 18 U.S.C. § 1962(c). Thus, in order to establish a federal civil RICO violation under § 1962(c), the plaintiffs "must satisfy four elements of proof: '(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.'" *Jones v. Childers*, 18 F.3d 899, 910 (11th Cir.1994) (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496, 105 S.Ct. 3275, 3285, 87 L.Ed.2d 346 (1985)). These requirements apply whether the RICO claim is civil or criminal in nature.

In civil cases, however, RICO plaintiffs must also satisfy the requirements of 18 U.S.C. § 1964(c). Section 1964(c) states that "[a]ny person injured in his business or property by reason of" RICO's substantive provisions has the right to "recover threefold the damages he sustains . . ." 18 U.S.C. § 1964(c). Thus, under § 1964(c), civil RICO claimants, such as the plaintiffs here, must show (1) the requisite injury to "business or property," and (2) that such injury was "by reason of" the substantive RICO violation. We discuss each of these requirements in turn.

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[2] This Court reviews the denial of a Rule 12(b)(6) motion "de novo, applying the same standard as the district court did." *Hoffman-Pugh v. Ramsey*, 312 F.3d 1222, 1225 (11th Cir.2002). A complaint should not be dismissed pursuant to Rule 12(b)(6) "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim." *Beck v. Deloitte & Touche*, 144 F.3d 732, 735 (11th Cir.1998) (internal quotation marks and citation omitted).

A. Pattern of Racketeering Activity

As mentioned above, there are four requirements under § 1962(c). Because elements (3) and (4)-a pattern of racketeering activity-are easily met in this case (at least at the motion-to-dismiss stage), we address them first.

"A 'pattern of racketeering activity,' for purposes of the RICO Act, 'requires at least two acts of racketeering activity.'" *Cox v. Adm'r U.S. Steel & Carnegie*, 17 F.3d 1386, 1397 (11th Cir.1994), *modified on other grounds by* 30 F.3d 1347 (11th Cir.1994). "An act of racketeering is commonly referred to as a 'predicate act.' A 'pattern' of racketeering activity is shown when a racketeer commits at least two distinct but related predicate acts." *Maiz v. Virani*, 253 F.3d 641, 671 (11th Cir.2001) (quotation marks, citations, and brackets omitted). "If distinct statutory violations are found, the predicate acts will be considered to be distinct irrespective of the circumstances under which they arose." *Cox,* 17 F.3d at 1397 (quotation marks, citations, and emphasis omitted).

According to 18 U.S.C. § 1961(1)(F), "'racketeering activity' means any act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in and harboring certain aliens), . . . if the act indictable under such section of such Act was committed for the purpose of financial gain." In this case, the plaintiffs have alleged that the defendant has engaged in an open and ongoing pattern of violations of section 274 of the Immigration and Nationality Act. In particular, plaintiffs allege that Mohawk has violated and continues to violate: (1) 8 U.S.C. § 1324(a)(3)(A), which makes it a federal crime to "knowingly hire[ ] for employment at least 10 individuals with actual knowledge that the individuals are aliens" during a twelve-month period; (2) 8 U.S.C. § 1324(a)(1)(A)(iii), which makes it a federal crime to "conceal[ ], harbor[ ], or shield from detection, or attempt [ ] to conceal, harbor or shield from detection" aliens that have illegally entered the United States; and (3) 8 U.S.C.

§ 1324(a)(1)(A)(iv), which makes it a federal crime to "encourage[ ] or induce[ ] an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law." According to the plaintiffs' complaint, Mohawk has committed hundreds, even thousands, of violations of federal immigration laws. Consequently, we conclude that the plaintiffs have properly alleged a "pattern of racketeering activity."[3]

B. Conduct of an Enterprise

With regard to elements (1) and (2) of the four-part test under § 1962(c), the plaintiffs must establish "conduct of an enterprise" and that the enterprise had a common goal. *See United States v. Turkette*, 452 U.S. 576, 583, 101 S.Ct. 2524, 2528-29, 69 L.Ed.2d 246 (1981) ("The enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct."). Furthermore, Mohawk "must participate in the operation or management of the enterprise itself." *Reves v. Ernst & Young*, 507 U.S. 170, 185, 113 S.Ct. 1163, 1173, 122 L.Ed.2d 525 (1993).

An enterprise "includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). As stated in *United States v. Goldin Industries, Inc.*, 219 F.3d 1271, 1275 (11th Cir.2000), "the existence of an enterprise is proved by evidence of an ongoing organization, formal or informal, and by evidence

[3] There is no dispute that these predicate acts, if they occurred, are related. *See Pelletier v. Zweifel*, 921 F.2d 1465, 1496-97 (11th Cir.1991) ("Predicate acts are related if they have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." (internal quotation marks and citation omitted)).

that the various associates function as a continuing unit." (internal quotation marks and citation omitted). Furthermore, "the definitive factor in determining the existence of a RICO enterprise is the existence of an association of individual entities, however loose or informal, that furnishes a vehicle for the commission of two or more predicate crimes, that is, the pattern of racketeering activity requisite to the RICO violation." *Id.*

In this case, the plaintiffs have alleged that Mohawk and third-party temp agencies/recruiters have conspired to violate federal immigration laws, destroy documentation, and harbor illegal workers. Specifically, the plaintiffs allege that

> [e]ach recruiter is paid a fee for each worker it supplies to Mohawk, and some of those recruiters work closely with Mohawk to meet its employment need by offering a pool of illegal workers who can be dispatched to a particular Mohawk facility on short notice as the need arises. Some recruiters find workers in the Brownsville, Texas area and transport them to Georgia. Others, like TPS, have relatively formal relationships with the company in which they employ illegal workers and then loan or otherwise provide them to Mohawk for a fee. These recruiters are sometimes assisted by Mohawk employees who carry a supply of social security cards for use when a prospective or existing employee needs to assume a new identity.

Given the Rule 12(b)(6) stage of the litigation, the plaintiffs' complaint must be taken as true, and it has sufficiently alleged an "enterprise" under RICO; that is an association-in-fact between Mohawk and third-party recruiters. This Court has never required anything other than a "loose or informal" association of distinct entities. Mohawk and the third-party recruiters are distinct entities that, at least according to the complaint, are engaged in a conspiracy to bring illegal

workers into this country for Mohawk's benefit. As such, the complaint sufficiently alleges an "enterprise" under RICO.

As for the common purpose, the plaintiffs' complaint alleges that "[t]he recruiters and Mohawk share the common purpose of obtaining illegal workers for employment by Mohawk." The complaint further alleges that "[e]ach recruiter is paid a fee for each worker it supplies to Mohawk" and that "Mohawk has made various incentive payments to employees and other recruiters for locating workers that Mohawk eventually employs and harbors." Furthermore, "[t]he acts of racketeering activity committed by Mohawk have the same or similar objective: the reduction of wages paid to Mohawk's hourly workforce." What is clear from the complaint is that each member of the enterprise is allegedly reaping a large economic benefit from Mohawk's employment of illegal workers.

In *United States v. Church*, 955 F.2d 688, 698 (11th Cir.1992), this Court concluded that the common purpose of making money was sufficient under RICO. Because the complaint clearly alleges that the members of the enterprise stand to gain sufficient financial benefits from Mohawk's widespread employment and harboring of illegal workers, the plaintiffs have properly alleged a "common purpose" for the purposes of RICO.

Furthermore, Mohawk "must participate in the operation or management of the enterprise itself." *Reves*, 507 U.S. at 185, 113 S.Ct. at 1173. That is, Mohawk "must have some part in directing" the affairs of the enterprise. *Id.* at 179, 113 S.Ct. at 1170. However, the Supreme Court has cautioned that "RICO liability is not limited to those with primary responsibility for the enterprise's affairs . . ." *Id.* In their complaint, the plaintiffs allege that "Mohawk participates in the operation and management of the affairs of the enterprise . . .," which includes some direction over the recruiters. Whatever difficulties the plaintiffs may have in proving such an allegation,

they have sufficiently alleged that Mohawk is engaged in the operation or management of the enterprise. Again, at this stage in the litigation, we simply cannot say whether the plaintiffs will be able to establish that Mohawk had "some part in directing" the affairs of the enterprise. However, they have alleged sufficient acts to survive a Rule 12(b)(6) motion.

Accordingly, we conclude that the plaintiffs' complaint states a claim that is cognizable under § 1962(c). In so doing, we note that the allegations in this case are similar to those in cases recently decided by the Second, Sixth, and Ninth Circuits. *See Trollinger v. Tyson Foods*, 370 F.3d 602 (6th Cir.2004) (former employees alleging employer used illegal immigrants in order to depress wages); *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163 (9th Cir.2002) (legally documented workers alleging that employers leveraged hiring of undocumented workers in order to depress wages); *Commercial Cleaning Servs., L.L.C. v. Colin Serv. Sys., Inc.*, 271 F.3d 374 (2d Cir.2001) (company alleging competitor hired undocumented workers in order to underbid competing firms). In each of these decisions, the circuit court determined that, at the Rule 12(b)(6) stage, the plaintiffs had alleged sufficient damages to be permitted to pursue their RICO claims. Although none of the opinions specifically addressed § 1962(c)'s requirements, each of these cases has essentially the same factual basis for RICO liability as the complaint before this Court.

We recognize that the above conclusion puts our circuit in conflict with the Seventh Circuit's decision in *Baker v. IBP, Inc.*, 357 F.3d 685 (7th Cir.2004), *cert. denied*, 543 U.S. 956, 125 S.Ct. 412, 160 L.Ed.2d 318 (2004). In *Baker*, an employees' class-action lawsuit alleged that a meat-processing facility conspired with recruiters (and a Chinese aid group), and violated RICO by employing undocumented, illegal workers in an effort to drive down employee wages. The

Seventh Circuit concluded that the employees' union was a necessary party to the lawsuit. *Id.* at 690-91.

However, the Seventh Circuit in *Baker* also concluded that there was "another fatal problem" with the complaint. *Id.* at 691. Although stating that an "enterprise" arguably existed, the Seventh Circuit determined that there was not a common purpose among the entities in the enterprise. *Id.* at 691. Specifically, the Seventh Circuit stated that the employer "wants to pay lower wages; the recruiters want to be paid more for services rendered (though [the employer] would like to pay them less); the Chinese Mutual Aid Association wants to assist members of its ethnic group. These are divergent goals." *Id.* at 691.

In our circuit, however, there has never been any requirement that the "common purpose" of the enterprise be the sole purpose of each and every member of the enterprise. In fact, it may often be the case that different members of a RICO enterprise will enjoy different benefits from the commission of predicate acts. This fact, however, is insufficient to defeat a civil RICO claim. Rather, all that is required is that the enterprise have a common purpose. In this case, the complaint alleges that Mohawk and the recruiters, under Mohawk's direction, worked together to recruit illegal workers to come to Georgia and that they had the common purpose of providing illegal workers to Mohawk so that Mohawk could reduce its labor costs and the recruiters could get paid. This commonality is all that this circuit's case law requires. *See Church*, 955 F.2d at 698. Again, while the plaintiffs may be unable to prove such allegations at trial, we cannot say at this 12(b)(6) stage of the litigation that they have failed to properly allege a common purpose.

We recognize that the *Baker* Court also concluded that there was no way to establish that the employer "operate[d] or manage[d] th[e] enterprise through a pattern of racketeering activity." *Baker*, 357 F.3d at 691 (emphasis omitted).

However, as this Court has noted, "the Supreme Court has yet to delineate the exact boundaries of the operation or management test." *United States v. Starrett*, 55 F.3d 1525, 1546 (11th Cir.1995). Although the exact boundaries have not been established, it is possible that the plaintiffs will be able to establish that Mohawk played some part in directing the affairs of the enterprise. Whether the plaintiffs ultimately establish sufficient evidence to meet the boundaries of the operation-or-management test is a question best answered at the summary-judgment stage or at trial. Accordingly, we conclude that the plaintiffs have sufficiently alleged conduct that may potentially satisfy the operation-or-management test. As such, the plaintiffs are entitled to continue with their claims at this juncture.

Having reviewed the four elements of § 1962(c), we turn to § 1964(c).

C. Injury to "Business or Property" Interest Under RICO

As indicated above, RICO's civil-suit provision states that "[a]ny person injured in his business or property by reason of" RICO's substantive provisions has the right to "recover threefold the damages he sustains . . ." 18 U.S.C. § 1964(c). "The terms 'business or property' are, of course, words of limitation which preclude [certain forms of] recovery." *Doe v. Roe*, 958 F.2d 763, 767 (7th Cir.1992). However, RICO is to be "liberally construed," *Sedima*, 473 U.S. at 497-98, 105 S.Ct. at 3285-86. Accordingly, we must determine whether the plaintiffs have a "business or property" interest that could be injured under RICO. We need not reach whether plaintiffs have a property interest because plaintiffs clearly have alleged a business interest affected by Mohawk's alleged RICO violations.

Indeed, this case is similar to the Ninth Circuit's *Mendoza* decision, where legally documented agricultural workers sued fruit growers under RICO alleging that the growers depressed

wages by hiring illegal workers. In *Mendoza,* the defendant claimed that the employees would have to show a " 'property right' in the lost wages[ ] by showing that they were promised or contracted for higher wages." *Mendoza*, 301 F.3d at 1168 n. 4. The Ninth Circuit concluded that this argument was misplaced, pointing out that the plaintiffs' claim did not implicate procedural due process. *Id.* Rather, the Ninth Circuit concluded that "what is required is precisely what the employees allege here: a legal entitlement to business relations unhampered by schemes prohibited by the RICO predicate statutes." *Id.* (citations omitted). Given that a relationship clearly exists between plaintiff workers and their employer, Mohawk, we conclude that a similar business interest exists in this case, and that the employees' alleged injury to their business interests satisfies the business-interest requirement. Consequently, the plaintiffs have alleged a sufficient injury to a business interest to pursue their RICO claims.

D. "By Reason Of" the Substantive RICO Violations

We now turn to the "by reason of" requirement contained in § 1964(c). The "by reason of" requirement implicates two concepts: (1) a sufficiently direct injury so that a plaintiff has standing to sue; and (2) proximate cause. *See Trollinger*, 370 F.3d at 612 ("RICO's civil-suit provision imposes two distinct but overlapping limitations on claimants-standing and proximate cause."); *Green Leaf Nursery v. E.I. DuPont De Nemours & Co.*, 341 F.3d 1292, 1307 (11th Cir.2003), *cert. denied,* 541 U.S. 1037, 124 S.Ct. 2094, 158 L.Ed.2d 723 (2004) ("[O]ne or more of the predicate acts [in a RICO claim] must not only be the 'but for' cause of the injury, but the proximate cause as well." (citations omitted)); *Mendoza*, 301 F.3d at 1168-72 (concluding that the plaintiffs had satisfied both "statutory" and "constitutional" standing requirements of RICO). Despite some significant overlap,

we address the proximate cause and standing concepts separately.[4]

(i) Proximate Cause

It is well-established that RICO plaintiffs must prove proximate causation in order to recover. *Anza v. Ideal Steel Supply Corp.*, ___ U.S. ___, 126 S.Ct. 1991, 164 L.Ed.2d 720 (2006); *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 112 S.Ct. 1311, 117 L.Ed.2d 532 (1992); *Cox*, 17 F.3d at 1399 (citations omitted). *Anza* makes clear that courts should scrutinize proximate causation at the pleading stage and carefully evaluate whether the injury pled was proximately caused by the claimed RICO violations. *See Anza,* 126 S.Ct. at 1997.

More importantly, in *Anza*, the United States Supreme Court instructed that "[w]hen a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to the plaintiff's

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[4] As the Sixth Circuit aptly explained,

> the two concepts overlap and that is particularly true in the context of civil RICO claims. As a general matter, they overlap because a plaintiff who lacks standing to vindicate a derivative injury also will be unable to show proximate cause. And as a matter of RICO law, the two concepts overlap because they both grow out of the "by reason of" limitation in RICO-namely, the requirement that claimants establish that their injury was "by reason of" a RICO predicate act violation. The "by reason of" limitation, in other words, bundles together a variety of "judicial tools," some of which are traditionally employed to decide causation questions and some of which are employed to decide standing questions. *Holmes,* 503 U.S. at 268, 112 S.Ct. [at 1318] ("Here we use 'proximate cause' to label generically the judicial tools used to limit a person's responsibility for the consequences of that person's own acts. At bottom, the notion of proximate cause reflects ideas of what justice demands, or of what is administratively possible and convenient.") (quotation omitted). . . .

Trollinger, 370 F.3d at 613.

injuries." *Anza*, 126 S.Ct. at 1998. This central question stems from the Supreme Court's earlier decision in *Holmes*, which examined "the common-law foundations of the proximate-cause requirement" and specifically the "demand for some direct relation between the injury asserted and the injurious conduct alleged." *Anza*, 126 S.Ct. at 1996 (quoting *Holmes*, 503 U.S. at 269, 112 S.Ct. at 1318). Although *Anza* does not require plaintiffs to show that the injurious conduct is the sole cause of the injury asserted, *Anza* does emphasize that in RICO cases there must be "some direct relation" between the injury alleged and the injurious conduct in order to show proximate cause. *Id.*[5]

In evaluating whether the requisite causal connection exists, *Anza* also instructs that courts should consider the "motivating principle[s]" behind the directness component of the proximate-cause standard in RICO cases. "One motivating principle is the difficulty that can arise when a court attempts to ascertain the damages caused by some remote action." *Anza*, 126 S.Ct. at 1997. Stated another way, "the less direct an injury is, the more difficult it becomes to ascertain the amount of plaintiff's damages attributable to the violation, as distinct from other, independent factors." *Holmes*, 503 U.S. at 269, 112 S.Ct. at 1318. This remoteness concern is heightened when RICO suits are brought by economic competitors seeking damages for lost sales because those types of claims, "if left unchecked, could blur the line

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[5] *Anza* also explains that "Congress modeled § 1964(c) [in the RICO statute] on the civil-action provision of the federal antitrust laws, § 4 of the Clayton Act." 126 S.Ct. at 1996 (quotation marks and citation omitted). In both federal RICO and federal antitrust cases, "proximate cause is not . . . the same thing as a sole cause," and it is enough for the plaintiff to plead and prove that the defendant's tortious or injurious conduct was a "substantial factor in the sequence of responsible causation." *Cox v. Adm'r U.S. Steel & Carnegie*, 17 F.3d 1386, 1399 (11th Cir.1994) (RICO), *modified on other grounds* by 30 F.3d 1347 (11th Cir.1994).

between RICO and the antitrust laws." *Anza,* 126 S.Ct. at 1998.

Another consideration is the risk of duplicative recoveries. "The requirement of a direct causal connection is especially warranted where the immediate victims of an alleged RICO violation can be expected to vindicate the laws by pursuing their own claims." *Anza*, 126 S.Ct. at 1998. As also aptly expressed in *Holmes*, "directly injured victims can generally be counted on to vindicate the law as private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely." *Holmes*, 503 U.S. at 269-70, 112 S.Ct. at 1318.

Turning back to this case, we conclude that the plaintiffs have alleged sufficient proximate cause to withstand defendant Mohawk's motion to dismiss. According to their complaint, Mohawk has hired illegal workers "[i]n an effort to keep labor costs as low as possible." Furthermore, "Mohawk's employment and harboring of large numbers of illegal workers has enabled Mohawk to depress wages and thereby pay all of its hourly employees, including legally employed workers who are members of the class, wages that are lower than they would be if Mohawk did not engage in this illegal conduct." Again, the complaint alleges that "Mohawk's widespread employment and harboring of illegal workers has substantially and unlawfully increased the supply of workers from which Mohawk makes up its hourly workforce. This unlawful expansion of the labor pool has permitted Mohawk to depress the wages that it pays all its hourly employees . . ." The plaintiffs also allege that "[o]ne purpose and intended effect of Mohawk's widespread employment and harboring of illegal workers is to deprive Mohawk's hourly workforce of any individual or collective bargaining power" and that they "were injured by direct and proximate reason of Mohawk's illegal conduct."

Given these allegations, which we must assume are true at this Rule 12(b)(6) stage of the litigation, it is clear that the plaintiffs have alleged a sufficiently direct relation between their claimed injury and the alleged RICO violations. In short, according to the complaint, Mohawk's widespread scheme of knowingly hiring and harboring illegal workers has the purpose and direct result of depressing the wages paid to the plaintiffs. Simply put, wholesale illegal hiring depresses wages for the legal workers in north Georgia where Mohawk is located. According to plaintiffs, Mohawk's illegal conduct had a substantial and direct effect on wages that Mohawk pays to legal workers. *See DeCanas v. Bica*, 424 U.S. 351, 356-57, 96 S.Ct. 933, 937, 47 L.Ed.2d 43 (1976) (explaining that "acceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens").[6] While *DeCanas* is not a RICO case, plaintiffs point out that the Supreme Court has already recognized a direct correlation between illegal hiring and lower wages.

In response, Mohawk asserts that other economic factors contribute to the plaintiffs' wages, that illegal hiring is just one of myriad factors affecting wages, and that therefore plaintiffs have not satisfied *Anza*'s proximate-cause requirements. However, plaintiffs persuasively reply that Mohawk's argument ignores that Mohawk's conduct has grossly distorted those normal market forces by employing literally *thousands* of illegal, undocumented aliens at its manufactur-

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[6] The Supreme Court quoted this same point in *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 892-93, 104 S.Ct. 2803, 2809, 81 L.Ed.2d 732 (1984) (quoting same, and adding that a "primary purpose in restricting immigration is to preserve jobs for American workers; immigrant aliens are therefore admitted to work in this country only if they 'will not adversely affect the wages and working conditions of the workers in the United States similarly employed.'" (citation omitted)).

ing facilities in north Georgia, thus depriving plaintiffs of "business relations unhampered by schemes prohibited by the RICO predicate statutes." Plaintiffs submit that their complaint focuses on only what is happening in the particular narrow labor market that Mohawk dominates in north Georgia. We agree with plaintiffs that their complaint alleges a sufficiently direct injury to satisfy *Anza* and *Holmes,* especially given the recognition of a direct correlation between illegal hiring and lower wages.

More importantly, as plaintiffs point out, in both *Holmes* and *Anza,* the Supreme Court emphasized that dismissal was appropriate because a more direct victim could bring suit. For example, the *Anza* plaintiff alleged that National Steel Supply, a competitor, had stopped paying sales taxes to the New York tax authority, submitted fraudulent documents to the tax authority, and used its tax savings to lower prices. The plaintiff sued for treble damages for sales lost to National. The Supreme Court concluded that New York, which lost the tax revenue due to National's fraudulent conduct, was the direct victim who could bring suit and not the plaintiff. *Anza,* 126 S.Ct. at 1997. Indeed, the state of New York could "be expected to pursue appropriate remedies." *Id.* at 1998. National's decision to lower prices to its customers and win sales from the plaintiff was "entirely distinct from the alleged RICO violation" of mail and wire fraud as to taxes owed to the New York tax authority. *Id.* at 1997.

Likewise, in *Holmes*, the plaintiff's injury was merely derivative of a prior injury to third parties (broker dealers) who had filed their own suit. *Holmes*, 503 U.S. at 271, 273, 112 S.Ct. at 1319-20; *see also Associated Gen. Contractors v. Cal. State Council of Carpenters*, 459 U.S. 519, 541, 103 S.Ct. 897, 910, 74 L.Ed.2d 723 (1983) (identifying alternative plaintiffs with more direct claims).

The concerns expressed in *Anza* and *Holmes* are not present in this case. There is no more direct injured party who

could bring suit. Mohawk posits the United States as the only other victim because of its interest in enforcing immigration laws. But as plaintiffs aptly point out, the United States is responsible for all federal criminal laws which includes RICO's other predicate acts. Under Mohawk's theory, the United States would arguably be the most direct victim of all RICO predicate, criminal acts. Congress, however, criminalized the employment of illegal workers in part to protect legal workers. It is consistent with civil RICO's purposes-to expand enforcement beyond federal prosecutors with limited public resources-to turn victims (here, Mohawk's legal workers) into prosecutors as private attorneys general seeking to eliminate illegal hiring activity by their *own* employer. *See Rotella v. Wood*, 528 U.S. 549, 557, 120 S.Ct. 1075, 1082, 145 L.Ed.2d 1047 (2000) (acknowledging that the very "object of civil RICO is . . . to turn [victims] into prosecutors, private attorneys general dedicated to eliminating racketeering activity" (quotation marks and citation omitted)); *see also Reiter v. Sonotone Corp.*, 442 U.S. 330, 344, 99 S.Ct. 2326, 2333, 60 L.Ed.2d 931 (1979) (noting that private antitrust suits "provide a significant supplement to the limited resources available at the Department of Justice").

Anza's concern about speculative damages, "intricate, uncertain injuries," and unwieldy apportionment are not implicated in this case because plaintiffs allege an injury fundamentally different from that in *Anza*. The plaintiff in *Anza* was a competitor suing for damages for lost opportunity or lost sales. In contrast, plaintiffs are Mohawk's own employees who seek to recover the diminution in wages they receive directly from Mohawk. Further, *Anza*'s concern about blurring the line between RICO and antitrust laws is wholly missing here.

We also recognize that Mohawk asserts that the cause of plaintiffs' alleged harms is a set of actions (paying lower wages) "entirely distinct" from the alleged RICO violation

(hiring illegal workers). We disagree. As noted earlier, it has long been recognized that hiring illegal workers on substandard wage terms depresses the wage scales of legal workers. Moreover, plaintiffs are not suing about the hiring of illegal workers on the west coast depressing the wages of legal workers on the east coast. Rather, plaintiffs' complaint is a narrow one about a single employer's-Mohawk's-hiring of thousands of illegal workers at its manufacturing facilities in north Georgia depressing the wages of legal workers of the same employer, Mohawk, at the same manufacturing facilities in the same limited geographical area. Accordingly, under the particular factual circumstances of this case, we conclude that plaintiffs' complaint satisfies the direct relationship requirement imposed by *Holmes* and *Anza*'s interpretation of the "by reason of" language in the federal RICO statute.

Our conclusion is consistent with the two other circuits to have addressed this proximate cause issue in RICO decisions involving schemes to depress wages of legal workers by widespread hiring of illegal workers. *See Trollinger*, 370 F.3d at 619; *Mendoza*, 301 F.3d at 1171-72.

In *Trollinger*, the Sixth Circuit considered a situation in which former Tyson employees at a poultry processing plant sued their former employer under RICO, alleging that the use of illegal workers permitted the employer to lower wages via the collective-bargaining agreement with the union representing the employees. The Sixth Circuit, reviewing the district court's dismissal of the employees' complaint under Rule 12(b)(6), determined that "at this preliminary stage in the proceeding" it could not conclude that there was no likelihood of success on the merits. *Id.* at 619. The Sixth Circuit explained that it remained possible that the legal-worker plaintiffs might prove the following allegations in their complaint:

> (1) that Tyson hired sufficient numbers of illegal aliens to impact the legal employees' wages; (2) that each

> additional illegal worker hired into the bargaining unit by Tyson has a measurable impact on the bargained-for wage-scale; (3) that the illegal immigrants allegedly brought into this country through Tyson's efforts allowed Tyson not to compete with other businesses for unskilled labor; and (4) that Tyson's legal workers did not "choose" to remain at Tyson for less money than other businesses offered, but had no choice in the matter given the hiring needs of the other businesses in the area and the influx of illegal immigrants at Tyson's facilities. While Tyson's proximate-cause argument may well carry the day at the summary-judgment stage, it requires more assistance than the complaint alone provides.
>
> One other circuit has reached the same result on somewhat similar facts . . . *Mendoza* . . .

Trollinger, 370 F.3d at 619.[7]

Although the plaintiffs' evidence in this case may not ultimately prove the proximate-cause requirement, we conclude that the plaintiffs' complaint states a sufficiently direct relation between their alleged injury and Mohawk's alleged unlawful predicate acts to withstand Mohawk's motion to dismiss. Consequently, we join the Sixth and Ninth Circuits in concluding that employees such as the ones in this case have alleged sufficient proximate cause to proceed with their RICO claims.

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[7] As noted earlier, in *Mendoza*, the Ninth Circuit was faced with a similar suit in which legally documented agricultural workers sued fruit growers under RICO alleging that the growers depressed wages by hiring illegal-immigrant workers. 301 F.3d at 1166. Under almost the exact same legal theory as advanced in this case, the *Mendoza* Court concluded that the plaintiffs' "causation allegations are sufficient at this stage." *Id.* at 1172.

(ii) Statutory Standing

Lastly, we address RICO's statutory standing limitation that also grows out of the "by reason of" limitation in § 1964(c). "[T]he test for RICO standing is whether the alleged injury was directly caused by the RICO violation, not whether such harm was reasonably foreseeable." *Bivens Gardens Office Bldg., Inc. v. Barnett Banks of Fla., Inc.*, 140 F.3d 898, 908 (11th Cir.1998); *see also Sedima*, 473 U.S. at 496-97, 105 S.Ct. at 3285 ("[T]he plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation" and the plaintiff's damages must "flow from the commission of the predicate acts."); *Green Leaf Nursery*, 341 F.3d at 1307 (stating that plaintiffs must show a "direct relation between the injury asserted and the injurious conduct" and that we ask "whether the alleged conduct was 'aimed primarily' at a third party" (quotation marks and citations omitted)); *Bivens*, 140 F.3d at 906 (concluding that a party whose alleged injuries result from "the misfortunes visited upon a third person by the defendant's acts lacks standing to pursue a claim under RICO" (quotation marks and citation omitted)); *Pelletier v. Zweifel*, 921 F.2d 1465, 1497 (11th Cir.1991) (stating that the plaintiff has RICO standing if he shows "a causal connection between his injury and a predicate act").[8] Thus, we must evaluate whether the plaintiffs' injury is sufficiently direct to give plaintiffs standing to sue for Mohawk's alleged RICO violations.

Both the Sixth and Ninth Circuits have expressly concluded that legal workers have sufficiently direct injuries for RICO standing in similar cases. *Trollinger*, 370 F.3d at 615-

[8] This Court has more often evaluated the "by reason of" requirement primarily as part of its proximate-cause analysis, as opposed to the distinct concept of standing. However, despite significant overlap, we must also examine whether the plaintiffs' injury is sufficiently direct to permit standing.

18; *Mendoza*, 301 F.3d at 1170. The Ninth Circuit's *Mendoza* decision is particularly well-reasoned and instructive on the statutory standing issue.

As mentioned earlier, the *Mendoza* plaintiffs were legal workers who claimed that the purpose and result of the defendants' scheme of hiring undocumented immigrants was to depress the wages of legally documented employees. The Ninth Circuit concluded that the plaintiffs had statutory standing because "we are unable to discern a more direct victim of the illegal conduct." *Mendoza*, 301 F.3d at 1170. The Ninth Circuit explained:

> The documented employees here do not complain of a passed-on harm. They allege that the scheme had the purpose and direct result of depressing the wages paid to them by the growers. Thus, as the district court correctly determined, "plaintiffs have stated a claim that they are the direct victims of the illegal hiring scheme."
>
> ...
>
> We also note that the undocumented workers cannot "be counted on to bring suit for the law's vindication." As the district court noted, the fact that RICO specifically provides that illegal hiring is a predicate offense indicates that Congress contemplated the enforcement of the immigration laws through lawsuits like this one.

Id. (internal citations omitted). The Ninth Circuit further stated that the workers must be allowed to make their case through presentation of evidence, including experts who will testify about the labor market, the geographic market, and the effects of the illegal scheme. Questions regarding the relevant labor market and the growers' power within that market are exceedingly complex and best addressed by economic experts and other evidence at a later stage in the proceedings.

Id. at 1171.

Plaintiffs' complaint clearly alleges that Mohawk has engaged in widespread and knowing hiring and harboring of illegal aliens with the express purpose and direct result of lowering the wages of legal workers. For example, the complaint alleges that "[o]ne purpose and intended effect of Mohawk's widespread employment and harboring of illegal workers is to deprive Mohawk's hourly workforce of any individual or collective bargaining power." The plaintiffs also allege that "[t]he acts of racketeering activity committed by Mohawk have the same or similar objective: the reduction of wages paid to Mohawk's hourly workforce." Furthermore, the plaintiffs "were injured by direct and proximate reason of Mohawk's illegal conduct." Given this stage of the litigation, we conclude that the plaintiffs have sufficiently alleged that Mohawk's illegal conduct was aimed primarily at them. Consequently, the district court correctly denied Mohawk's 12(b)(6) motion as it relates to the plaintiffs' federal civil RICO claim.

III. STATE LAW RICO

Under the Georgia RICO statute, "[i]t is unlawful for any person, through a pattern of racketeering activity or proceeds derived therefrom, to acquire or maintain, directly or indirectly, any interest in or control of any enterprise, real property, or personal property of any nature, including money." O.C.G.A. 16-14-4(a). Unlike federal civil RICO, the Georgia RICO statute does not require proof of an "enterprise." *Cobb County v. Jones Group, P.L.C.*, 218 Ga.App. 149, 460 S.E.2d 516, 520-21 (1995). Rather, under Georgia RICO, the plaintiffs need only establish racketeering activity; that is, "a plaintiff must show that the defendant committed predicate offenses (set forth in O.C.G.A. § 16-14-3(9)) at least twice." *Id.* at 521 (quotation marks and citation omitted).

With regard to their state-law RICO claim, the plaintiffs rely on 18 U.S.C. § 1546 (relating to the fraud and misuse of visas, permits, and other documents) for their predicate

offenses.[9] Despite being limited to § 1546, the plaintiffs have alleged sufficiently numerous violations to satisfy the racketeering activity requirement under Georgia state law. In fact, according to the complaint, "Mohawk has committed hundreds, probably thousands, of violations of . . . 18 U.S.C. § 1546 as part of its pattern of racketeering activity."

There are, however, two issues under the Georgia RICO statute that warrant further discussion: (1) whether a corporation is a "person" who may be sued for purposes of the Georgia RICO statute; and (2) whether the plaintiffs have sufficiently alleged proximate cause to have standing to bring a Georgia RICO suit.

A. Whether Corporations May be Sued Under Georgia RICO

The Georgia Supreme Court recently answered the precise question of whether a corporation may be sued under the Georgia RICO statute. *See Williams Gen. Corp. v. Stone*, 280 Ga. 631, 632 S.E.2d 376 (2006). The Georgia Supreme Court noted that the prohibitions in the Georgia RICO Act apply to "any person" under O.C.G.A. § 16-14-4. *Williams*, 280 Ga. at 631, 632 S.E.2d at 377. The term "person," however, is not defined in the definition section of the Georgia RICO Act. *See* O.C.G.A. § 16-14-3 (definition section). The Georgia Supreme Court pointed out that, nonetheless, the Georgia legislature had "set forth the desired application of the term [person] in the definition section promulgated for use in the title [Title 16] which includes the Georgia RICO Act."

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[9] According to O.C.G.A. § 16-14-3(9)(A)(xxix), "racketeering activity" is defined as "conduct defined as 'racketeering activity' under 18 U.S.C. Section 1961(1)(A), (B), (C), and (D)." The only "racketeering activity" contained in 18 U.S.C. § 1961(1)(A), (B), (C), or (D) on which the plaintiffs rely is § 1546. To the extent the plaintiffs attempt to rely on § 1324, as they do with their federal civil RICO claims, such a claim is barred under the Georgia RICO statute because § 1324 is listed as a "racketeering offense" in 18 U.S.C. § 1961(1)(F), and not in subsections (A), (B), (C), or (D).

Williams, 280 Ga. at 631, 632 S.E.2d at 377. The Georgia Supreme Court explained that the definition section for use in Title 16 of the Georgia Code is O.C.G.A. § 16-1-3(12). *Id.* The Georgia Supreme Court then quoted § 16-1-3(12), which provides that "person" includes an individual, a public or private *corporation,* an incorporated association, government, government agency, partnership, or unincorporated association. *Id.* at 632, 632 S.E.2d at 377. Additionally, the Georgia Supreme Court observed that "the definition section of the entire Georgia Code notes that 'person' includes a corporation," citing O.C.G.A. § 1-3-3(14). *Id.* at 632, 632 S.E.2d at 378 (quotation marks omitted). Accordingly, the Georgia Supreme Court concluded that a corporation is subject to and may be sued under Georgia's RICO Act. *Id.* at 631, 632 S.E.2d at 377.

The Georgia Supreme Court in *Williams* also expressly rejected the argument, which Mohawk makes here, that O.C.G.A. § 16-2-22, which places limits on corporate criminal liability, should apply to civil suits which stem from criminal law violations. *Id.* at 632-33, 632 S.E.2d at 378. Instead, the Georgia Supreme Court expressly held that "O.C.G.A. § 16-2-22 does not pertain to civil suits brought under the Georgia civil RICO Act." *Id.* In light of *Williams,* we conclude that Mohawk, a corporation, may be sued under the Georgia RICO statute.[10] We now turn to the next question of standing.

B. Standing to Pursue State-Law RICO Claims

As with Federal RICO claims, under Georgia's RICO statute, "[a]ny person who is injured *by reason of* any violation of" Georgia's RICO statute "shall have a cause of action for three times the actual damages sustained . . ."

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[10] In interpreting a state law, federal courts apply the decisions of that state's highest court. *See CSX Transp., Inc. v. Trism Specialized Carriers, Inc.*, 182 F.3d 788, 789 (11th Cir.1999).

O.C.G.A. § 16-14-6(c) (emphasis added). "[B]ecause the state RICO act is modeled upon and closely analogous to the federal RICO statute," Georgia courts "look to federal authority" in determining RICO standing. *Maddox v. So. Eng'g Co.*, 231 Ga.App. 802, 500 S.E.2d 591, 594 (1998) (quotation marks and citation omitted). We already have concluded that the plaintiffs have alleged sufficient injury to pursue their federal RICO claims, and accordingly, we conclude that they have alleged a sufficient injury to pursue their state RICO claims as well. Although under Georgia law the plaintiffs are limited to predicate acts arising out of 18 U.S.C. § 1546, we conclude that the plaintiffs' allegations are neither indirect nor too remote to satisfy Georgia's proximate-cause requirement under state-law RICO. *See Maddox,* 500 S.E.2d at 594 ("In short, the language 'by reason of' imposes a proximate causation requirement on the plaintiff." (citation omitted)); *id.* (A plaintiff "must show a causal connection between his injury and a predicate act." (citation omitted)).[11]

IV. UNJUST ENRICHMENT

The plaintiffs' complaint claims that Mohawk's illegal conduct permits it "to reap substantial wage savings" because Mohawk pays plaintiffs lower wages than it would otherwise be forced to pay. Therefore, according to the plaintiffs' complaint, Mohawk has been unjustly enriched under state law. Plaintiffs also claim that Mohawk has been unjustly enriched because the hiring of illegal aliens has led to a reduced number of worker's-compensation claims. Both of plaintiffs' state-law unjust-enrichment claims fail.

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[11] Plaintiffs also seek injunctive relief under the Georgia RICO Act which allows any "aggrieved person" to sue for injunctive relief, without requiring an injury "by reason of" the illegal conduct. *Compare* O.C.G.A. § 16-14-6(b) *with* O.C.G.A. § 16-14-6(c). Thus, we need not discuss *Anza* and Mohawk's proximate-cause arguments as to plaintiffs' claims for injunctive relief under the Georgia RICO Act.

Here, the plaintiffs were all paid an agreed-upon wage. In essence, the plaintiffs have a contract to work for the defendant and were paid the agreed-upon wage. In Georgia, "[u]njust enrichment is an equitable concept and applies when as a matter of fact there is no legal contract . . ." *St. Paul Mercury Ins. Co. v. Meeks*, 270 Ga. 136, 508 S.E.2d 646, 648 (1998) (quotation marks and citation omitted); *see Bonem v. Golf Club of Ga., Inc.*, 264 Ga.App. 573, 591 S.E.2d 462, 467-68 (2003). In this case, there was a legal contract as a matter of fact (i.e., if the plaintiffs were not paid, they could sue for breach of the employment contract). *See, e.g., SurgiJet, Inc. v. Hicks*, 236 Ga.App. 80, 511 S.E.2d 194, 195 (1999); *Brazzeal v. Commercial Cas. Ins. Co.*, 51 Ga.App. 471, 180 S.E. 853, 853 (1935). Therefore, there can be no unjust enrichment. Consequently, the plaintiffs' unjust-enrichment claim as it related to Mohawk's purported savings from lower wages should have been dismissed.

As for plaintiffs' claims that hiring illegal workers resulted in fewer worker's-compensation claims, there is no reasonable allegation that this fact, even if true, is connected to the plaintiffs receiving lower wages. To put it another way, the fact that Mohawk may have increased profits by lowering the number of worker's-compensation claims it paid is not related to what wages Mohawk paid the plaintiffs. Consequently, the district court correctly determined that the plaintiffs did not have standing to assert this claim.

V. CONCLUSION

For all the above reasons, we conclude that the district court properly denied Mohawk's Rule 12(b)(6) motion as it related to both the plaintiffs' federal and state RICO claims. Furthermore, the district court properly dismissed the plaintiffs' unjust-enrichment claim as it related to worker's compensation. However, the district court should have also

dismissed the plaintiffs' unjust-enrichment claim as it related to the agreed-upon wages that plaintiffs received.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS.

APPENDIX B

SUPREME COURT OF THE UNITED STATES

No. 05-465.

MOHAWK INDUSTRIES, INC.,
Petitioner,

v.

SHIRLEY WILLIAMS, *et al.*

Dec. 12, 2005

Case below, 411 F.3d 1252.

Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit granted limited to Question 1 presented by the petition.

APPENDIX C

SUPREME COURT OF THE UNITED STATES

No. 05-465

MOHAWK INDUSTRIES, INC.,
Petitioner,

v.

SHIRLEY WILLIAMS *et al.*

June 5, 2006

PER CURIAM

The writ of certiorari limited to Question 1 presented by the petition, granted at 546 U.S. ___, 126 S.Ct. 830, 163 L.Ed.2d 705 (2005), is dismissed as improvidently granted. The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Eleventh Circuit for further consideration in light of *Anza v. Ideal Steel Supply Corp.*, ___ U.S., 126 S.Ct. 1991, 164 L.Ed.2d 720 (2006).

It is so ordered.

APPENDIX D

UNITED STATES DISTRICT COURT
N.D. GEORGIA
ROME DIVISION

No. CIV.A.4:04-CV-0003-H

SHIRLEY WILLIAMS, GALE PELFREY, BONNIE JONES, and LORA SISSON, individually and on behalf of a class,
Plaintiffs,

v.

MOHAWK INDUSTRIES, INC.,
Defendant.

April 12, 2004

ORDER

MURPHY, *District Judge.*

This is a class action alleging violations of the federal and Georgia Racketeer Influenced and Corrupt Organizations Acts ("RICO"). The case is before the Court on Defendant's Motion to Dismiss [25].

I. Background

A. The Parties

Plaintiffs are current and former hourly employees of Defendant who claim that Defendant's alleged employment and harboring of illegal aliens has depressed their wages. (Compl.¶ 1.) Plaintiffs Gale Pelfrey, Shirley Williams, Bonnie Jones, and Lora Sisson are citizens of Georgia and reside in the Northern District of Georgia. (*Id.* ¶¶ 5-8.) Plaintiffs Pelfrey, Williams, and Sisson are former hourly employees of Defendant. (Compl.¶¶ 5, 6, 8.) Plaintiff Jones is currently an

hourly employee of Defendant. (*Id.* ¶ 7.) Plaintiffs Pelfrey, Williams, Sisson, and Jones are eligible to be employed in the United States. (*Id.* ¶¶ 5-8.) Plaintiffs seek certification of a class consisting of all current and former employees of Defendant legally authorized to be employed in the United States who are or have been employed in hourly wage positions at any time since January 5, 1999, to the present (the "Class").[1] (*Id.* ¶ 39.)

Defendant is the second largest carpet and rug manufacturer in the United States. (Compl.¶ 2.) Defendant employs approximately 31,780 persons, most of whom are employed in Northwest Georgia. (*Id.*) Defendant owns or leases at least twenty-six facilities in Georgia. (*Id.*) Defendant is a Delaware corporation with its principal place of business in Calhoun, Georgia. (*Id.* ¶ 9.)

B. Plaintiffs' Allegations

Plaintiffs allege that Defendant has engaged in illegal hiring of persons who are not eligible for employment in the United States in an effort to keep costs of labor as low as possible. (Compl.¶ 14.) According to Plaintiffs, Defendant has accepted for employment and continues to employ workers that it knew or had reason to know were not authorized to work in the United States. (*Id.* ¶ 15.) Plaintiffs allege that Defendant has knowingly and recklessly accepted false documents or documents that do not match the identity of the person presenting the documents as proof of eligibility for employment. (*Id.* ¶ 16.) Additionally, Plaintiffs claim that Defendant has knowingly and recklessly accepted proof of eligibility for employment documents reflecting successive different names for a single person. (*Id.* ¶¶ 17, 19.) Indeed,

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[1] Plaintiffs' Complaint also sets forth a number of allegations relating to the certification of a class of Defendant's former and current hourly employees. (*See* Compl. ¶¶ 39-53.) Those allegations are not relevant to the instant Motion.

Plaintiffs allege that when some illegal workers have informed Defendant that they would return to their countries of origin, supervisors employed by Defendant have encouraged those employees to return to the United States and illegally reapply for work at Defendant. (*Id.* ¶ 18.)

Plaintiffs claim that in an effort to conceal Defendant's employment and harboring of illegal workers, Defendant's employees have destroyed eligibility documents indicating that workers have employed different names and identification papers. (Compl.¶ 20.) Furthermore, according to Plaintiffs, Defendant's employees and supervisors have stated that they are aware that illegal workers can easily obtain false identification and work authorization documents. (*Id.* ¶ 21.)

Plaintiffs claim that Defendant's employees have traveled to the United States border to recruit illegal aliens. (Compl. ¶ 22.) According to Plaintiffs, those employees and other persons then transported the illegal aliens to North Georgia for employment at Defendant's facilities. (*Id.*) Plaintiffs allege that Defendant has provided incentive to its employees and other recruiters by paying for locating illegal workers that Defendant eventually employs and harbors. (*Id.*) Plaintiffs contend that Defendant's employees and recruiters have provided housing for illegal workers when the workers arrived in North Georgia, and have aided those illegal workers in finding employment with Defendant. (*Id.* ¶ 23.)

Occasionally, Defendant audits its workforce and discovers illegal workers are employed with Defendant. (Compl.¶ 24.) According to Plaintiffs, Defendant has not increased the frequency of such audits despite the fact that the audits reveal that a large number of illegal workers are employed at Defendant. (*Id.*) Furthermore, Plaintiffs allege that when Defendant terminates an illegal worker after discovering that the illegal worker is not authorized to work in the United States, the worker frequently returns to work under a different name. (*Id.* ¶ 25.) Plaintiffs claim that this practice, termed

"recycling," is widespread at Defendant. (*Id.* ¶ 26.) According to Plaintiffs, Defendant has been further put on notice of illegal workers because many illegal workers artificially inflate their claimed exemptions, thus avoiding paying federal income tax. (*Id.* ¶ 32.)

Plaintiffs allege that law enforcement authorities have raided Defendant's facilities in search of illegal workers. (Compl.¶ 27.) Plaintiffs claim that when such raids have occurred, illegal workers have hidden in barrels or other containers or have fled. (*Id.*) According to Plaintiffs, the number of illegal workers who run or hide has put Defendant on notice that it employs a large number of illegal workers. (*Id.*) Moreover, Plaintiffs contend that Defendant's employees and supervisors have assisted illegal workers in evading the law enforcement authorities. (*Id.* ¶ 28.)

Plaintiffs state that law enforcement authorities have arrested some illegal workers at Defendant's facilities. (Compl.¶ 29.) Plaintiffs further allege that law enforcement authorities have discovered undocumented aliens in possession of paychecks issued by Defendant or identification badges and fraudulent identification documents. (*Id.* ¶ 30.)

According to Plaintiffs, Defendant's supervisors have stated that illegal workers are preferable because those workers are more tolerant of working conditions and do not submit claims for workers' compensation. (Compl.¶ 31.) Plaintiffs contend that because many of Defendant's workers are undocumented aliens, Defendant knows that those workers are beholden to Defendant, and thus are unlikely to complain about working conditions or file workers compensation claims. (*Id.* ¶¶ 36-37.) Consequently, Plaintiffs believe that Defendant saves a considerable amount of money by employing undocumented aliens. (*Id.* ¶ 37.)

According to Plaintiffs, Defendant's practice of employing and harboring large numbers of illegal workers has allowed

Defendant to depress wages; consequently, the wages paid to hourly employees, including the legally employed hourly employees who are members of the Class, are lower than those wages would be if Defendant did not employ and harbor illegal workers. (Compl.¶ 33.) Plaintiffs allege that Defendant employs tens of thousands of hourly workers in North Georgia (*id.* ¶ 34), and Defendant's widespread employment and harboring of illegal workers has substantially increased the supply of workers from which Defendant hires its hourly workers (*id.* ¶ 35). Plaintiffs contend that because of the increased size of the labor pool, Defendant has depressed the wages it pays to all of its hourly employees, including members of the Class. (*Id.*) In other words, Plaintiffs claim that Defendant had only hired persons legally authorized to work in the United States, Defendant would have had to pay higher wages to Plaintiffs and the members of the Class. (*Id.*) Thus, according to Plaintiffs, as a direct and proximate result of Defendant's employment and harboring of illegal workers, the wages that Plaintiffs and the members of the Class have earned have been depressed.

C. Plaintiffs' RICO Claims

1. Pattern of Racketeering Activity

Plaintiffs first allege that Defendant is engaged in an ongoing pattern of racketeering activity as defined by 18 U.S.C.A. § 1961(5) & (8). (Compl.¶¶ 54, 56.) According to Plaintiffs, Defendant has engaged in racketeering activity, namely, an open and ongoing pattern of violations of Section 274 of the Immigration and Nationality Act, 8 U.S.C.A. § 1324(a), more than twice, and the most recent occurrence took place within ten years after the commission of a prior act of racketeering activity. (*Id.* ¶ 55, 57, 58.) In particular, Plaintiffs allege that Defendant has violated and continues to violate: (1) 8 U.S.C.A. § 1324(a)(3)(A), which makes it a federal crime to "knowingly hire[ ] for employment at least 10 individuals with actual knowledge that the individuals are

aliens" during a twelve month period (*id.* ¶ 59); (2) 8 U.S.C.A. § 1324(a)(1)(A)(iii), which makes it a federal crime to "conceal[ ], harbor[ ] or shield from detection, or attempt[ ] to conceal, harbor or shield from detection" aliens that have illegally entered the United States (*id.* ¶ 60); and (3) 8 U.S.C.A. § 1324(a)(1)(A)(iv), which makes it a federal crime to "encourage[ ] or induce[ ] an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law" (*id.* ¶ 61). Plaintiffs contend that each violation of 8 U.S.C.A. § 1324 constitutes an act of "racketeering activity" as defined by 18 U.S.C.A. § 1961(1)(F). (*Id.* ¶ 62.)

According to Plaintiffs, the "racketeering activity" also includes Defendant's open and ongoing violations of 18 U.S.C.A. § 1546(a) by knowingly accepting various false identification documents and other false documents indicating authorization for legal employment, and Defendant's continued violations of 18 U.S.C.A. § 1546(b) by using such documents to fill out I-9 forms. (Compl.¶¶ 63-64.) Plaintiffs allege that each violation of 18 U.S.C.A. § 1546 constitutes an act of "racketeering activity" as defined by 18 U.S.C.A. § 1961(1)(B) as well as O.C.G.A. § 16-14-3(9)(A)(xxix). (*Id.* ¶¶ 65-66.)

Plaintiffs claim that the acts of Defendant's racketeering activity have the same or similar methods of commission in that those acts involve the knowing employment of illegal workers, the concealment, harboring, and shielding from detection of illegal workers, and the acceptance or use of fraudulent documents in connection with the hiring of illegal workers. (Compl.¶ 67.) According to Plaintiffs, the acts of racketeering activity have the same or similar objective—*i.e.* the reduction of wages paid to Defendant's workforce. (*Id.* ¶ 68.) Plaintiffs allege that the victims of those acts of racketeering activity are the same or similar. (*Id.* ¶ 69.)

Plaintiffs also contend that the distinguishing characteristics of the acts of racketeering activity include the involvement of Defendant, illegal workers, and other third parties who assist in the recruitment and transportation of undocumented aliens. (*Id.* ¶¶ 70, 76-84.)

According to Plaintiffs, those acts of racketeering activity have occurred over a long period of time, and have become a part of Defendant's regular way of doing business. (Compl.¶¶ 71-73.) Plaintiffs assert that Defendant has committed hundreds, and perhaps thousands, of violations of 8 U.S.C.A. § 1324 and 18 U.S.C.A. § 1546 as part of its racketeering activity. (*Id.* ¶ 74.) Indeed, Plaintiffs claim that Defendant's racketeering activity has been so pervasive that illegal workers currently constitute a majority of the workforce in many of Defendant's facilities in North Georgia. (*Id.* ¶ 75.)

2. Enterprise

Plaintiffs also allege that Defendant has engaged in its pattern of racketeering activity through its participation in an association-in-fact enterprise, as defined by 18 U.S.C.A. § 1961(4), with third party employment agencies and other recruiters who supply Defendant with illegal workers. (Compl.¶¶ 76, 79.) Plaintiffs claim that one such recruiter is Temporary Placement Services ("TPS"), which has a formal relationship with Defendant in that TPS employs illegal workers and then loans those workers to Defendant for a fee. (*Id.*) According to Plaintiffs, other recruiters simply find workers in an area surrounding Brownsville, Texas, and then transport those workers to Georgia. (*Id.*) Plaintiffs contend that TPS and other recruiters also occasionally assist current and prospective illegal workers in assuming new identities. (*Id.*) Plaintiffs allege that those recruiters share the common purpose of obtaining illegal workers for employment with Defendant. (*Id.* ¶ 77.) Additionally, Plaintiffs contend that Defendant participates in the operation and management of

the affairs of the enterprise, which exists for Defendant's benefit. (*Id.* ¶ 78.)

Plaintiffs allege that the enterprise affects interstate commerce in that the illegal workers employed by Defendant travel in international and interstate commerce to reach Defendant's facilities in North Georgia. (Compl.¶¶ 80, 81.) According to Plaintiffs, the enterprise also affects interstate commerce in that the wages of legal workers employed with Defendant are depressed. (*Id.* ¶ 82.) Furthermore, Plaintiffs state that because Defendant is a member of the enterprise and is directly engaged in the production, distribution, and acquisition of goods and services in interstate commerce, the enterprise affects interstate commerce. (*Id.* ¶ 83.)

According to Plaintiffs, Defendant, by accepting and retaining the benefits of the racketeering activity, ratified the conduct of Defendant's managers, employees, and the members of the enterprise who assisted Defendant in committing those acts of racketeering activity. (*Id.* ¶ 84.)

3. Causation

Plaintiffs next allege that Defendant's violations of federal and Georgia RICO proximately caused the wages of Plaintiffs and the members of the Class to be lower than their wages otherwise would have been had the labor pool consisted solely of legally employed workers. (Compl.¶ 85.) Thus, Plaintiffs and the Class claim that they have suffered an injury to their business or property. (*Id.* ¶ 86.) As a result, Plaintiffs contend that Defendant has earned or retained significant funds to which it is not entitled. (*Id.* ¶ 87.)

D. Procedural Background

On January 6, 2004, Plaintiffs filed this lawsuit. Plaintiffs assert the following claims: (1) a claim that Defendant's conduct violates 18 U.S.C.A. § 1962(c) (Compl. ¶¶ 88-92); (2) a claim that Defendant's conduct violates O.C.G.A.

§ 16-14-4(a) (*id.* 93-98); (3) a claim that Defendant's conduct violates O.C.G.A. § 16-14-4(c) (*id.* 99-105); and a claim for unjust enrichment arising under Georgia law (*id.* ¶¶ 106-110). Plaintiffs also seek certification of a class pursuant to Federal Rule of Civil Procedure 23. (*Id.* ¶ 46.)

On February 9, 2004, Defendant filed its Motion to Dismiss pursuant to Federal Rules of Civil Procedure (12)(b)(6) and (12)(b)(1),[2] in which Defendant requests that the Court dismiss Plaintiffs' federal and state RICO claims. Defendant also requests that the Court decline to exercise its pendent jurisdiction over Plaintiffs' state law claims.

II. Standard Governing Motions to Dismiss

The standard for a court to dismiss a claim is whether "it appears beyond doubt that the plaintiff can prove no set of facts to support his claim." *GSW, Inc. v. Long County*, 999 F.2d 1508, 1510 (11th Cir.1993) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)). When considering a motion to dismiss, the Court "must accept the allegations in the complaint as true, construing them in the light most favorable to the plaintiffs." *White v. Lemacks*, 183 F.3d 1253, 1255 (11th Cir.1999). However, "[a]s a general rule, conclusory allegations and unwarranted deductions of fact are not admitted as true in a motion to dismiss." *S. Fla.*

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[2] Defendant moves to dismiss pursuant to Rules 12(b)(1) and 12(b)(6) only with respect to the elements of 18 U.S.C.A. § 1964(c), which provides the requirements for a plaintiff to have standing to pursue a civil private right of action under RICO. Apparently, some question exists as to whether a motion to dismiss under § 1964(c) is properly characterized as a 12(b)(6) motion (*i.e.* failure to state a claim upon which relief can be granted) or a 12(b)(1) motion (*i.e.* lack of jurisdiction over the subject matter). *See Moore v. PaineWebber, Inc.*, 189 F.3d 165, 169 n. 3 (2d Cir.1999) (applying 12(b)(6), but expressing belief that 12(b)(1) was more appropriate ground for dismissal). The Court appreciates the distinction between 12(b)(1) and 12(b)(6), but concludes that for the purposes of the instant Motion, an analysis under 12(b)(6) suffices.

Water Mgmt. Dist. v. Montalvo, 84 F.3d 402, 408 n. 10 (11th Cir.1996).

III. Discussion

A. Plaintiffs' Federal RICO Claim

18 U.S.C.A. § 1962(c) provides: "It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." 18 U.S.C.A. § 1962(c). RICO establishes both civil remedies and criminal penalties for violations of § 1962. *See* 18 U.S.C.A. §§ 1963-1964. In particular, § 1964(c) provides that "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee . . . ." 18 U.S.C.A. § 1964(c). Thus, for a plaintiff to have standing to pursue a private civil cause of action under RICO, the plaintiff must prove the following elements: (1) that the defendant violated § 1962; (2) that the plaintiff sustained an injury to his business or property; and (3) that the violation of § 1962 caused the injury. *Avirgan v. Hull*, 932 F.2d 1572, 1577 (11th Cir.1991) (citing *O'Malley v. O'Neill*, 887 F.2d 1557, 1560-61 (11th Cir.1989)). Likewise, to prevail on a civil RICO claim under § 1962(c), the plaintiff must show: (1) the existence of an enterprise; (2) that the enterprise affected interstate commerce; (3) that the defendant was employed by or associated with the enterprise; (4) that the defendant participated, either directly or indirectly, in the conduct of the affairs of the enterprise; and (5) that the defendant participated through a pattern of racketeering activity. *United States v. Starrett*, 55 F.3d 1525, 1541 (11th Cir.1995).

18 U.S.C.A. § 1961 provides definitions for some of the terms used in § 1962(c). "Racketeering activity" includes a number of "predicate acts" that the racketeer must commit for a violation of RICO. 18 U.S.C.A. § 1961(1). Notably, violations of 8 U.S.C.A. § 1324 and 18 U.S.C.A. § 1546, the predicate acts that Plaintiffs allege Defendant committed, are among those predicate acts listed in § 1961(1). 18 U.S.C.A. § 1961(1)(B) & (F). A "pattern of racketeering activity" is defined as at least two acts of racketeering activity that occurred within ten years after the commission of a prior act of racketeering activity. 18 U.S.C.A. § 1961(5); *see Pelletier v. Zweifel*, 921 F.2d 1465, 1496 (11th Cir.1991) ("A 'pattern' of racketeering activity is shown when a racketeer commits at least two distinct but unrelated predicate acts."). Section 1961 also provides that an "'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C.A. § 1961(4). Likewise, a "person" liable under § 1962(c) is defined as "any individual or entity capable of holding a legal or beneficial interest in property." 18 U.S.C.A. § 1961(3).

Defendant contends that the Court should dismiss Plaintiffs' Complaint because: (1) the Complaint does not sufficiently allege the elements of the RICO predicate action; (2) the Complaint fails to identify a legally sufficient RICO enterprise; and (3) Plaintiffs lack standing to assert their RICO claims. The Court addresses each of those arguments in turn.

1. Sufficiency of Pleadings

a. Whether Plaintiffs Failed to Plead Predicate Acts with Particularity

As a threshold matter, the Court addresses Defendant's contention that Plaintiffs' Complaint fails to meet the heightened pleading requirements of Federal Rule of Civil Proce-

dure 9(b). When pleading a RICO action, it is well-settled that where the predicate act sounds in fraud (e.g. mail fraud, wire fraud, or securities fraud), the plaintiff must plead that predicate act with particularity as required by Federal Rule of Civil Procedure 9(b). *Byrne v. Nezhat*, 261 F.3d 1075, 1109-10 (11th Cir.2001) (mail fraud); *Republic of Panama v. BCCI Holdings (Lux.)*, 119 F.3d 935, 949 (11th Cir.1997) (wire fraud); *Brooks v. Blue Cross & Blue Shield of Fla., Inc.*, 116 F.3d 1364, 1380-82 (11th Cir.1997) (mail fraud and wire fraud); *Durham v. Bus. Mgmt. Assocs.*, 847 F.2d 1505, 1511-12 (11th Cir.1988) (securities fraud); *see also* 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1251.1 n. 13 (citing cases finding that fraud claims brought under RICO must comply with pleading requirements of Rule 9(b)).

As the United States Court of Appeals for the Eleventh Circuit has not yet addressed whether the heightened pleading requirement of Rule 9(b) applies to RICO causes of action premised on non-fraud predicate acts, some ambiguity exists as to whether the particularized pleading requirements of Rule 9(b) apply in *all* RICO actions. *Compare Taylor v. Bear Stearns & Co.*, 572 F.Supp. 667, 682 (N.D.Ga.1983) (Forrester, J.) ("It seems, however, to this court at least that there are many sound reasons for requiring that, like fraud, [RICO] must be pled with particularity.") *and Helicopter Support Sys., Inc. v. Hughes Helicopters, Inc.*, No. 83-1450-Civ.-T-15, 1984 WL 3238, at *1 (M.D.Fla. June 22, 1984) (same) *with Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 945 F.Supp. 1355, 1380 n. 25 (D.Or.1996) (finding Rule 9(b) inapplicable where predicate acts are extortion and coercion); *and United States v. Int'l Bhd. of Teamsters*, 708 F.Supp. 1388, 1395-96 (S.D.N.Y. 1989) ("This court is not persuaded by the reasoning of the courts that have applied Rule 9(b) to RICO actions not sounding in fraud, and adopts the reasoning of courts that limit the application of Rule 9(b) to fraud based RICO

claims."); *and United States v. Bonanno Organized Crime Family of LaCosa Nostra*, 683 F.Supp. 1411, 1426-27 (E.D.N.Y.1988) (finding "no basis for extending the reach of Rule 9(b) to all RICO cases"). Those courts holding that Rule 9(b) applies in all RICO actions reason such heightened pleading is appropriate in light of the *in terrorem* effect of pleading RICO and in order to put the RICO defendant on notice of the claim against him. *See Taylor*, 572 F.Supp. at 682 ("First, the mere invocation of the statute has such an *in terrorem* effect that it would be unconscionable to allow it to linger in a suit and generate suspicion and unfavorable opinion of the putative defendant unless there is some articulable factual basis which, if true, would warrant recovery under the statute. Second, the concepts within the statute are so nebulous that if the cause of action were only generally pled, a defendant would have no effective notice of a claim showing that the pleader is entitled to relief.")

Plaintiffs urge the Court to find that the appropriate pleading standard for non-fraud RICO predicate activities is the standard provided in Rule 8(e)(1). *See* Fed. R. Civ. Proc. 8(e)(1) ("Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required."). Specifically, Plaintiffs contend that the reasoning underlying *Taylor* is inapplicable in light of *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985). In *Sedima,* the United States Supreme Court held that a plaintiff in a RICO action need not allege and prove that the defendant had previously been convicted under RICO. 473 U.S. at 492, 105 S.Ct. 3275. In reaching that conclusion, the Supreme Court dismissed the argument that a RICO conviction should be required to pursue a civil RICO action, stating, "[a]s for stigma, a civil RICO proceeding leaves no greater stain than do a number of other civil proceedings." *Id.* Plaintiffs urge the Court to conclude that in light of the foregoing language from *Sedima*, Rule 9(b) is limited to cases that actually involve fraud or

mistake, and does not apply in every case where the defendant claims it is stigmatized.

The Court finds Plaintiffs' reasoning persuasive, and finds that the better approach, and certainly the majority approach, is to apply the liberal pleading standards of Rule 8 to RICO actions involving non-fraud predicate activities. Additionally, the Court notes *Taylor* and *Helicopter Support Sys.* are distinguishable because the predicate activities in those cases were mail fraud and wire fraud, rather than a non-fraud predicate act.[3] Accordingly, the Court finds that where a predicate act does not sound in fraud, the plaintiff asserting a RICO claim need only comply with the general pleading requirements of Rule 8(e)(1), rather than the heightened pleading requirements of Rule 9(b).[4]

Having determined that Rule 9(b) is inapplicable in cases involving non-fraud RICO actions, the Court next addresses Defendant's argument that the predicate acts enumerated in Plaintiffs' Complaint sound in fraud, and must therefore be pled with particularity. In support of its position, Defendant cites to a string of criminal cases where courts referred to the predicate acts alleged in the instant lawsuit as "acts of fraud."

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[3] In *Helicopter Support Sys.*, the plaintiff also asserted a claim for commercial bribery. *Helicopter Support Sys.* at *1. The court found that the plaintiff failed to show that commercial bribery was a predicate offense under § 1961(1); thus, it was unnecessary to address whether that offense required heightened pleading under Rule 9(b). *Id.*

[4] Defendant's reliance on *Club Car, Inc. v. Club Car Import, Inc.* 276 F.Supp.2d 1276 (S.D.Ga.2003), is misplaced. In that case, the plaintiff was required to plead predicate acts of extortion and mail fraud with particularity simply because Local Rule 9.1 for the United States District Court for the Southern District of Georgia requires such specificity. *See* L.R.S.D. Ga. 9.1 ("All pleadings which allege violations of . . . , RICO, and other similar statutes, whether federal or state, shall specifically state each alleged violation.") This Court, however, has no such provision in its Local Rules. Consequently, the Court does not find *Club Car* applicable in this case.

See, e.g., United States v. Rodriguez-Suazo, 346 F.3d 637 (6th Cir.2003); *United States v. Thiongo*, 344 F.3d 55, 58 (1st Cir.2003); *United States v. Hendricks*, No. 99-4562, 2000 WL 341914, at *2 (4th Cir. Apr.3, 2000); *United States v. Yum*, 776 F.2d 490, 491 (4th Cir.1985). Those cases, however, do not require a finding that the predicate acts based on violations of 8 U.S.C.A. § 1324(a) and 18 U.S.C.A. § 1546 sound in fraud. The cases relied upon by Defendant involve defendants who were charged with making false representations, or conspiring to make false representations, to the federal government. By contrast, Plaintiffs do not allege that Defendant made false representations to Plaintiffs or the government; rather, Plaintiffs allege that Defendant has employed and harbored illegal workers. The predicate acts in this case consequently do not sound in fraud. Because the predicate acts in this case do not sound in fraud, the Court finds that Rule 9(b) is inapplicable to this case. Instead, Plaintiffs need only satisfy the requirements of Federal Rule of Civil Procedure 8.

The Court further notes that it has evaluated the Complaint, and finds that it satisfies the requirements set forth in Rule 8. Accordingly, the Court cannot dismiss the Complaint on the ground that Plaintiffs failed to plead the predicate acts adequately.

b. Whether Plaintiffs Failed to Allege All the Elements Required to Plead a Violation of 8 U.S.C.A. § 1324(a)(3)

Defendant also contends that Plaintiffs have failed to plead sufficiently the violation of 8 U.S.C.A. § 1324(a)(3), one of the predicate acts alleged in the Complaint. Specifically, Defendant claims that the Complaint fails to allege all the required elements of § 1324(a)(3), which provides:

> (A) Any person who, during any 12-month period, knowingly hires for employment at least 10 individuals with actual knowledge that the individuals are aliens

> described in subparagraph (B) shall be fined under Title 18 or imprisoned for not more than 5 years, or both.
>
> (B) An alien described in this subparagraph is an alien who—
>
> (i) is an unauthorized alien (as defined in section 1324a(h)(3) of this title), and
>
> (ii) has been brought into the United States in violation of [8 U.S.C.A. § 1324(a)].

8 U.S.C.A. § 1324(a)(3). Defendant contends that to plead a violation of § 1324(a)(3) adequately, Plaintiffs must allege that Defendant knowingly hired ten or more aliens and that Defendant *itself* brought those aliens into the United States.

In support of its position, Defendant relies on *System Management, Inc. v. Loiselle*, 91 F.Supp.2d 401 (D.Mass. 2000). The Court, however, does not agree that the holding of *Loiselle* is as limited as Defendant insists. In *Loiselle*, the defendant owner and chief executive officer of a janitorial and custodial services company was sued by two competitor corporations and four former employees. *Loiselle*, 91 F.Supp.2d at 404. The plaintiffs alleged that the defendant had violated RICO by engaging in racketeering activity including "knowingly hiring at least ten individuals with knowledge that they were 'aliens' as described in 8 U.S.C. § 1324(a)(3)(A)." *Id.* at 408. The defendant argued, and the court agreed, that the RICO claim premised on § 1324(a)(3) should be dismissed because the plaintiffs failed to allege "how the aliens entered the country or whether [the defendant] had knowledge of the purpose for which they entered." *Id.* The court reasoned that the language of § 1324(a)(3)(B)(ii) "seems to require, in order for liability to attach, that the aliens have been brought into the country by *an* employer for the purpose of illegal employment." *Id.* In other words, "the Plaintiffs must allege that [the defendant] had knowledge of how the aliens had been brought into the

United States and that they were *brought* into the United States in violation of this employment provision." *Id.* Thus, *Loiselle* holds that simple allegations that the defendant knowingly hired undocumented aliens are insufficient to state a claim under § 1324(a)(3); rather, a plaintiff must additionally allege that the defendant knew that the aliens were brought into the United States for the purpose of illegal employment. *Loiselle,* however, did not hold that the employer *itself* must have brought the aliens into the United States for a claim to arise under § 1324(a)(3). Accordingly, the Court concludes that for a plaintiff to plead a violation of § 1324(a)(3) adequately, the plaintiff must simply allege that the aliens were *brought* into the United States in violation of subsection (a), but there is no requirement that the employer must have brought the aliens into this country.

Turning to the Complaint, the Court concludes that Plaintiffs have pleaded adequately the elements of § 1324(a)(3). Specifically, Plaintiffs have alleged that Defendant has hired illegal workers knowing that those workers were "smuggled or otherwise brought" into the United States illegally. (Compl.¶ 59.) *See Mendoza v. Zirkle Fruit Co.*, No. CS-00-3024-FVS, 2000 WL 33225470, at *4 (E.D.Wash. Sept. 27, 2000) (finding "the plaintiffs have adequately pled a predicate act . . . by alleging that the defendants knew that some of their workers were unlawfully brought into the United States"). Accordingly, the Court denies Defendant's Motion to Dismiss as to this ground.

2. Enterprise

The Court next determines whether the Complaint adequately alleges the existence of a RICO enterprise. Defendant contends that Plaintiffs' Complaint fails as a matter of law to allege that a RICO enterprise existed and that the Court thus must dismiss Plaintiffs' Complaint. Specifically, Defendant claims: (1) that Plaintiffs have not and cannot allege that Defendant participated in the affairs of a RICO enter-

prise, rather than its own affairs, through the alleged immigration law violations; (2) that Plaintiffs have failed to allege a RICO enterprise distinct from Defendant; and (3) that Plaintiffs have failed to allege the existence of a common purpose and unified structure.

As explained *supra* Part III.A., a RICO "'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity," 18 U.S.C.A. § 1961(4), and a RICO "person" is "any individual or entity capable of holding a legal or beneficial interest in property," 18 U.S.C.A. § 1961(3). "For the purposes of [§ 1962(c)], the indictment [or complaint] must name a RICO person distinct from the RICO enterprise. The plain language of the statute requires that [those] entities be distinct." *United States v. Goldin Indus., Inc.*, 219 F.3d 1268, 1271 (11th Cir.2000) (hereinafter "*Goldin I*"). The Eleventh Circuit does not require a strict, formal association of participants; rather, "the existence of an enterprise 'is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit.'" *United States v. Goldin Indus., Inc.*, 219 F.3d 1271, 1275 (11th Cir.2000) (hereinafter "*Goldin II*") (quoting *United States v. Turkette*, 452 U.S. 576, 583, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981)). "[T]he definitive factor in determining the existence of a RICO enterprise is the existence of an association of individual entities, however loose or informal, that furnishes a vehicle for the commission of two or more predicate crimes, that is, the pattern of racketeering activity requisite to the RICO violation." *Id.; United States v. Elliott*, 571 F.2d 880, 897-98 (5th Cir.1978);[5] *see also United States*

[5] Opinions of the Fifth Circuit issued prior to October 1, 1981, the date marking the creation of the Eleventh Circuit, are binding precedent on this Court. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1209-11 (11th Cir.1981) (en banc).

v. Hawes, 529 F.2d 472, 479 (5th Cir.1976) (recognizing that Congress gave the term "enterprise" a very broad meaning). Indeed, "a RICO enterprise may be an 'amoeba-like' structure or a loose informal association." *Avirgan v. Hull*, 932 F.2d 1572, 1578 (11th Cir.1991) (citing *United States v. Cagnina*, 697 F.2d 915, 921 (11th Cir.1983)).

Notably, the existence of an enterprise is a separate element that the plaintiff must prove—*i.e.* although a pattern of racketeering activity must be shown by pointing to evidence of the requisite number of racketeering acts by participants in the enterprise, such evidence does not necessarily establish the existence of an enterprise. *Turkette*, 452 U.S. at 583, 101 S.Ct. 2524. Indeed, "[t]he 'enterprise' is not the 'pattern of racketeering activity'; it is an entity separate and apart form the pattern of activity in which it engages." *Id.* Nevertheless, the Eleventh Circuit recognizes that "under our case law, a RICO enterprise need not possess an 'ascertainable structure' distinct from the associations necessary to conduct the pattern of racketeering activity." *Goldin II*, 219 F.3d at 1274-75 (quoting *United States v. Weinstein*, 762 F.2d 1522, 1537 n. 13 (11th Cir.1985)).

In support of its position that the Complaint fails to allege the existence of an enterprise adequately, Defendant relies heavily on a similar opinion issued by the Seventh Circuit, *Baker v. IBP, Inc.*, 357 F.3d 685 (7th Cir.2004). In *Baker*, unionized current and former employees of one of the defendant's meat-processing plants filed a class action lawsuit on behalf of all current and former hourly employees at that plant who were authorized to work in the United States. *Baker*, 357 F.3d at 686. Specifically, the complaint in *Baker* alleged that nearly half of the employees at the defendant's plant were aliens who were unauthorized to work legally in the United States. *Id.* The plaintiffs claimed that the defendant turned a blind eye to bogus identification documents, alerted its illegal workers when immigration officials were

about to conduct inspections, and paid recruiters to smuggle captured illegal workers back into the United States for re-employment under pseudonyms. *Id.* at 687. The complaint further alleged that the defendant had arrangements with immigrant welfare organizations, who referred known undocumented aliens to the defendant for employment. *Id.* Plaintiffs alleged that as a result of that activity, wages at the defendant's plant were depressed compared with what the defendant would have had to pay if the labor pool consisted only of persons legally authorized to work in the United States. *Id.*

In affirming the district court's dismissal of the complaint, the Seventh Circuit first concluded that the union representing the plaintiffs was the proper representative with respect to the wages issue rather than the employees individually. The court also concluded that "there [was] another fatal problem in [the] complaint: specification of the 'enterprise.'" *Baker*, 357 F.3d at 691. The complaint alleged that the "enterprise" was the defendant plus the persons and organizations who assisted the defendant in recruitment of illegal workers. The court first noted that the complaint came "perilously close to alleging that [the defendant] plus its agents and employees is the 'enterprise,' a theory that won't fly." *Id.* (citing *Bucklew v. Hawkins, Ash, Baptie & Co.*, 329 F.3d 923, 934 (7th Cir.2003)).

The court also found that the complaint was flawed for failure to identify a common purpose: "it is not altogether clear how this 'association in fact' has a common purpose, an essential ingredient." *Id.* (citing *Turkette*, 452 U.S. at 583, 101 S.Ct. 2524). The court took a conservative reading as to whether the members of the "association in fact," had a common purpose concluding that their goals were divergent because the defendant wanted to pay lower wages, the recruiters wanted to be paid for their recruitment services, and the immigrant welfare organizations wanted to assist mem-

bers of the ethnic group. *Id.* Consequently, the court found that no common purpose existed. *Id.*

Finally, the *Baker* court found that the plaintiffs failed to allege that the defendant operated or managed the purported enterprise through a pattern of racketeering. *Baker*, 357 F.3d at 692. The court explained that the complaint was insufficient because "[t]he nub of the complaint [was] that [the defendant] operate[d] itself unlawfully—it is [the defendant] that supposedly hires, harbors, and pays the unlawful workers, for the purpose of reducing its payroll." *Id.* at 361. Specifically, the court stated that "[the defendant] does not manage or operate some other enterprise by violating [8 U.S.C.A. § 1324]; the complaint does not allege—and on appeal plaintiffs do not seek an opportunity to show—that [the defendant] ha[d] infiltrated, taken over, manipulated, disrupted, or suborned a distinct entity or even a distinct association in fact." *Id.* The Court therefore found that the plaintiffs failed to allege that the defendant operated an enterprise through a pattern of racketeering activity. *Id.*

Turning to the instant case, the Court first considers Defendant's argument that Plaintiffs have failed to allege that Defendant operated or participated in the affairs of an enterprise through a pattern of racketeering activity. Specifically, Defendant contends that Plaintiffs have failed to allege that Defendant, through its allegedly illegal conduct, operated or participated in the affairs of an "association in fact" as opposed to Defendant's own affairs. In support of its position, Defendant points to various paragraphs in the Complaint that allege that Defendant, as opposed to the purported enterprise, harbored and employed illegal workers in order to reduce the cost of its workforce. (*See Compl.* ¶¶ 3, 14, 16-18, 59-61; 63-64, 67.)

In response, Plaintiffs argue that the Complaint alleges that Defendant "participates in the affairs of an enterprise that transcends [Defendant] itself and that consists of [Defendant]

and various other persons and entities." (Def. Br. Resp. at 7 (emphasis deleted).) Specifically, Plaintiffs point to the following language in the Complaint:

> Mohawk has engaged in an open and ongoing pattern of violations of 8 U.S.C. § 1324 and 18 U.S.C. § 1546 during the last five years through its participation in an association-in-fact enterprise with third party employment agencies and other recruiters, including Temporary Placement Services ("TPS"), that supply Mohawk with illegal workers. Each recruiter is paid a fee for each worker it supplies to Mohawk, and some of those recruiters work closely with Mohawk to meet its employment needs by offering a pool of illegal workers who can be dispatched to a particular Mohawk facility on short notice as the need arises. Some recruiters find workers in the Brownsville, Texas area and transport them to Georgia. Others, like TPS, have relatively formal relationships with the company in which they employ illegal workers and then loan or otherwise provide them to Mohawk for a fee. These recruiters are sometimes assisted by Mohawk employees who carry a supply of social security cards for use when a prospective or existing employee needs to assume a new identity.

(Compl.¶ 76.) Plaintiffs maintain that given the nature of an association-in-fact enterprise, it is to be expected that the defendant will be engaged in the management of its own affairs—what is most important, however, is that the defendant also participates in the affairs of an enterprise.

Defendant correctly asserts that "liability 'depends on showing that the defendants conducted or participated in the conduct of the enterprises's affairs, not just their own affairs.'" *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163, 121 S.Ct. 2087, 150 L.Ed.2d 198 (2001) (quoting *Reves v. Ernst & Young*, 507 U.S. 170, 185, 113 S.Ct. 1163, 122 L.Ed.2d 525 (1993)) (internal quotation omitted) (em-

phasis deleted). The Eleventh Circuit has nevertheless recognized that "the definitive factor in determining the existence of a RICO enterprise is the existence of an association of individual entities, however loose or informal, that furnishes a vehicle for the commission of two or more predicate acts." *Goldin II*, 219 F.3d at 1275; *Weinstein*, 762 F.2d at 1537. Here, the Complaint alleges that Defendant participated in the conduct of an enterprise's affairs by paying recruiters for illegal workers and by maintaining a formal relationship with TPS, and that those parties, as an association-in-fact, provided the means for the commission of a number of immigration law violations. Consequently, the Court finds that Plaintiffs' Complaint sufficiently alleges that Defendant operated or participated in the affairs of an enterprise through a pattern of racketeering activity.

The Court next addresses whether Plaintiffs have failed to allege an enterprise distinct from Defendant itself. Although the Complaint clearly alleges that the other members of the alleged enterprise are independent third parties rather than employees or agents of Defendant (Compl.¶ 76.), Defendant urges the Court to follow *Baker,* and to find that the Complaint fails to allege the existence of an enterprise.

At this stage in the litigation, however, the Court need only determine whether the Complaint sufficiently alleges the existence of an enterprise separate from Defendant. After consideration of the allegations in the Complaint, the Court concludes that for the purposes of this Motion to Dismiss, Plaintiffs have adequately alleged that the recruiters are separate and independent entities from Defendant. Whether the third party recruiters are in fact agents of Defendant is a factual issue, but for the purposes of the instant Motion Plaintiffs have met their burden to allege that the association-in-fact enterprise consisted of Defendant and separate entities. *See Cedric Kushner Promotions*, 533 U.S. at 164, 121 S.Ct. 2087 (citing *Riverwoods Chappaqua Corp. v. Marine Mid-*

land Bank, N.A., 30 F.3d 339, 344 (2d Cir.1994)); *In re Managed Care Litig.*, 298 F.Supp.2d 1259, 1276-77 (S.D.Fla.2003) (finding complaint sufficiently alleged control and participation in association-in-fact enterprise). *Cf. Fitzgerald v. Chrysler Corp.*, 116 F.3d 225, 228 (7th Cir.1997) ("[W]here a large, reputable manufacturer deals with its dealers and other agents in the ordinary way, so that their role in the manufacturer's illegal acts is entirely incidental, differing not at all from what it would be if these agents were the employees of a totally integrated enterprise, the manufacturer plus its dealers and other agents . . . do not constitute an enterprise within the meaning of [RICO]."). Accordingly, the Court cannot conclude that Plaintiffs have failed to allege the existence of an enterprise district from Defendant itself.

Defendant next argues that Plaintiffs have failed to allege the existence of an enterprise because the Complaint does not adequately allege the existence of a common purpose among the members of the association-in-fact. Specifically, Defendant claims that rather than alleging a common purpose between Defendant and the recruiters, Plaintiffs' Complaint indicates that the members of the purported enterprise had divergent goals and purposes. (*See* Compl. ¶ 22 ("Mohawk has made various incentive payments to employees and other recruiters for locating workers that Mohawk eventually employs and harbors.").) Defendant therefore contends that as a matter of law, no enterprise exists. Defendant cites to the following language in *Baker* in support of its argument: "[the employer] wants to pay lower wages; the recruiters want to be paid more for services rendered (though [the employer] would like to pay them less); and the [immigrant welfare organizations] want [ ] to assist members of [their] ethnic group." *Baker* 357 F.3d at 691. Thus, because the members of the enterprise have divergent goals, Defendant concludes that no association-in-fact enterprise exists.

Plaintiffs respond that in this case, the members of the enterprise indeed share a common purpose namely, "the common purpose of obtaining illegal workers for employment by Mohawk." (Compl.¶ 77.) Moreover, Plaintiffs maintain that no authority exists in the Eleventh Circuit for the proposition that divergent individual goals of persons in a purported association-in-fact enterprise precludes the existence of such enterprise as a matter of law.

The Eleventh Circuit takes a broad approach as to what qualifies as an enterprise. *See United States v. Hewes*, 729 F.2d 1302, 1310-12 (11th Cir.1984) (upholding jury determination that "'informal, de facto association' existed among the defendants that united them in the common purpose of making money from repeated criminal activity") (quoting *Elliott*, 571 F.2d at 898); *Cagnina*, 697 F.2d at 921-922 (finding evidence sufficient to support jury's finding of enterprise where common purpose of making money existed). Because the Complaint in this case explicitly alleges that a common purpose exists—obtaining illegal workers for employment by Defendants—the Court cannot agree with Defendant that Plaintiffs' Complaint is deficient.

In sum, the Court finds that the Complaint adequately sets forth allegations concerning the existence of an enterprise. Specifically, Plaintiffs have sufficiently alleged that Defendant participated in the affairs of a RICO enterprise as opposed to its own affairs, that a RICO enterprise exists distinct from Defendant, and that a common purpose and unified structure exists among the participants in the purported enterprise. Consequently, the Court denies Defendant's Motion to Dismiss on the ground that the Complaint fails to allege the existence of an enterprise.

3. Standing Under RICO

Defendant also argues that Plaintiffs do not have standing to sue because (1) Plaintiffs failed to allege injury to a con-

crete interest in business or property; and (2) Plaintiffs can not show that Defendant's alleged violations of 8 U.S.C.A. § 1324 proximately caused Plaintiffs' injuries. The Court discusses each of those arguments in turn.

a. Whether Plaintiffs Have Alleged Injury to their "Business or Property"

The Court turns first to whether Plaintiffs have alleged an injury to their business or property. Defendant argues that each Plaintiff accepted employment with Defendant at an agreed-upon wage rate, and that Plaintiffs cannot allege an injury to their business or property because Defendant paid each Plaintiff in accordance with those wage rates. In other words, Defendant claims that because it compensated Plaintiffs as the parties agreed, no injury has occurred, and Plaintiffs thus lack standing to pursue this action.

The Court cannot agree that as a matter of law Plaintiffs have failed to allege an injury to their business or property. The premise of Defendant's argument is that Defendant and Plaintiffs were able to bargain freely on a fair wage rate; however, assuming that Plaintiffs have been injured by reason of Defendant's alleged racketeering activities, the presence of illegal workers in the labor pool adversely has affected Plaintiffs' ability to command higher wage rates. In other words, if Plaintiffs are correct regarding issues of causation, Plaintiffs had no power to command higher wage rates due to the influx of illegal workers. Consequently, Plaintiffs' acceptance of lower wages could not act as a waiver of their alleged injuries. *See Mendoza*, 301 F.3d at 1168 n. 4. ("[W]hat is required is precisely what the employees allege here: a legal entitlement to business relations unhampered by schemes prohibited by the RICO predicate statutes."). Thus, the Court cannot agree with Defendant that Plaintiffs have failed, as a matter of law, to allege an injury to Plaintiffs' business or property. The Court therefore cannot find that Plaintiffs lack standing based on this argument.

b. Whether Plaintiffs Have Alleged Injury "By Reason of" a Violation of § 1962(c)

Defendant further argues that Plaintiffs have not alleged an injury "by reason of" a violation of § 1962(c) and that Plaintiffs consequently cannot show that Defendant's alleged violations caused Plaintiffs' injuries. Section 1964(c) requires a plaintiff to show that he sustained injury "by reason of" the defendant's violation of § 1962. The Supreme Court, in *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 112 S.Ct. 1311, 117 L.Ed.2d 532 (1992), held that the "by reason of" language of § 1964(c) requires a showing of both direct and proximate causation. 503 U.S. at 268-69, 112 S.Ct. 1311. "In order for a pattern of racketeering activity to be a cognizable cause of civil RICO injury to a private plaintiff, one or more of the predicate acts must not only be the 'but for' cause of the injury, but the proximate cause as well." *Green Leaf Nursery v. E.I. DuPont De Nemours & Co.*, 341 F.3d 1292, 1307 (11th Cir.2003) (citing *Holmes,* 503 U.S. at 268, 112 S.Ct. 1311). Thus, for a plaintiff to have standing under RICO, he must allege and prove that "'his injury flowed directly from the commission of the predicate acts.'" *Bivens Gardens Office Bldg., Inc. v. Barnett Banks of Fla., Inc.*, 140 F.3d 898, 906 (11th Cir.1998) (quoting *Pelletier*, 921 F.2d at 1499).

In analyzing whether a plaintiff has adequately alleged an injury "by reason of" a violation of § 1962(c), the Supreme Court in *Holmes* recognized that "'the infinite variety of claims that may arise make it virtually impossible to announce a black-letter rule that will dictate the result in every case.'" *Holmes,* 503 U.S. at 272 n. 20, 112 S.Ct. 1311 (quoting *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 536, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983) (footnote omitted)). Thus, "use of the term 'direct' should merely be understood as a reference to the proximate-cause enquiry that is informed by

the [policy] considerations set out in the text [of the *Holmes* opinion]." *Id.* In conducting proximate cause analysis under RICO, a court must therefore consider the following policy considerations on a case-by-case basis: (1) whether other parties are in a more suitable position to vindicate the law—*i.e.* whether the plaintiff is the direct victim of the alleged illegal conduct; (2) whether the court can identify a method to apportion possible recoveries; and (3) whether the damages alleged by the plaintiff are too speculative, that is, whether the court has the ability to identify what portion of the plaintiff's damages arose from the defendant's alleged RICO violations as opposed to other independent conditions. *Id.* at 273, 112 S.Ct. 1311.

In its Motion to Dismiss, Defendant first contends that Plaintiffs cannot show, and thus cannot allege, that Plaintiffs are the direct victims of Defendant's alleged wrongdoing, and that Plaintiffs consequently are not the best-suited persons to maintain this action. Defendant next contends that Plaintiffs' theory of damages is simply too speculative to support a finding that Defendant's conduct proximately caused Plaintiffs' injuries.[6] The Court addresses each of those arguments in turn.[7]

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[6] Defendant does not contend that other parties are better-situated to vindicate the aims of RICO. Because the Court concludes that Plaintiffs' injuries, as alleged, are not derivative of injury to a third party, the Court sees no reason why a party other than Plaintiffs should instead pursue this action.

[7] As an initial matter, the Court addresses Defendant's argument that Plaintiffs have standing as to pursue their federal RICO action only as to the predicate act of employing illegal workers. Specifically, Defendant claims that because Plaintiffs cannot show that the predicate acts of harboring and transporting illegal aliens and the use and acceptance of fraudulent documents caused injury to Plaintiffs, Plaintiffs lack standing with respect to those predicate acts.

The Eleventh Circuit has stated that "[i]f no injury flowed from a particular predicate act, no recovery lies for the commission of that act."

i. Direct Injury

In the instant action, Defendant first claims Plaintiffs lack standing because the legally authorized hourly workers constituting the putative class are not the direct victims of Defendant's alleged pattern of racketeering activity—*i.e.* Plaintiffs are not the best persons to vindicate RICO. Defendant relies primarily on *Holmes* for the proposition that where a plaintiff's injury is derived from a direct injury to a third party, that plaintiff lacks standing to bring an action pursuant to RICO for such "passed-on" injury. Defendant argues that Plaintiffs are not the "first victims" of Defendant's alleged immigration law violations; rather, the direct victims are the undocumented aliens who, because of their status, cannot command equal wages or enjoy equal benefits, such as workers' compensation.

Plaintiffs cite *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163 (9th Cir.2002), in which the Ninth Circuit found that a putative class of legal hourly workers had standing to bring a RICO action against two agricultural companies that had

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Pelletier, 921 F.2d at 1497-98 (finding no standing as to predicate act of bankruptcy fraud where predicate act actually benefitted plaintiff). However, "a wrongful act 'is a proximate cause if it is a substantial factor in the sequence of reasonable causation.'" *Maiz v. Virani*, 253 F.3d 641, 675 (11th Cir.2001) (quoting *Cox v. Adm'r U.S. Steel & Carnegie*, 17 F.3d 1386, 1399 (11th Cir.1994)) (internal quotation marks omitted). Thus, while a predicate act may not be a "but for" cause of a plaintiff's injuries, the plaintiff may nevertheless have standing to pursue a RICO claim where that predicate act was a substantial factor "in perpetuating [the racketeer's] scheme and in causing significant injury to [the plaintiff]." *Id.*

With respect to the predicate acts of harboring and inducing illegal aliens and the use and acceptance of bogus identification documents, the Court cannot conclude at this point that those predicate acts do not constitute substantial factors in causing injury to Plaintiffs. Accordingly, the Court concludes that Plaintiffs do not lack standing to claim that those predicate acts proximately caused their injuries.

allegedly hired illegal workers, thereby depressing the wages paid to documented workers. 301 F.3d at 1166. Like Defendant in the instant matter, the defendants in *Mendoza* urged the court to find that the plaintiffs were not the "first victims" of the alleged illegal conduct. The court in *Mendoza* concluded that because the defendants engaged in illegal conduct to gain "disproportionate bargaining power in employment contracts" with their workers, the legal, documented employees were the direct victims of the defendants' illegal conduct. Because "the [illegal conduct] had the purpose and direct result of depressing the wages paid to [the documented employees] by the growers," the court could not "discern a more direct victim of the illegal conduct." *Id.* at 1170. The court further explained: "Neither the government nor the undocumented workers are an intervening third party in this scheme, despite the [defendants'] arguments to the contrary." *Id.*

Plaintiffs also rely on *Commercial Cleaning Services, LLC v. Colin Service Systems, Inc.*, 271 F.3d 374 (2d Cir.2001), in which the Second Circuit held that the plaintiffs, who were competitors of the defendant, adequately stated a direct proximate relationship between their injuries and the defendant's alleged illegal conduct. 271 F.3d at 381. In that case, a cleaning service brought a RICO class action, alleging that the defendant, also a cleaning service, hired undocumented aliens in violation of 8 U.S.C.A. § 1324, thereby driving down the defendant's cost of employment. *Id.* at 378. The plaintiff claimed that the defendant's illegal conduct allowed the defendant to charge lower prices for its services, thereby undercutting its competition. *Id.*

The *Commercial Cleaning* court applied the *Holmes* policy considerations, and found that the plaintiffs had suffered direct injury due to the defendant's alleged racketeering activity. *Commercial Cleaning*, 271 F.3d at 385. Specifically, the Second Circuit reasoned that no class of persons would

"have a greater incentive to ensure that a RICO violation does not go undetected or unremedied, and whose recovery would cure the loss suffered by there plaintiffs." *Id.*

The Court finds *Mendoza* persuasive, and applies the *Mendoza* court's reasoning to this case. Here, Plaintiffs clearly allege that their injury is the result of Defendant's attempt to gain a commercial advantage over the employment of its workforce, which directly causes harm to Plaintiffs. Accordingly, the Court finds that the Complaint alleges a direct injury to Plaintiffs. Plaintiffs therefore do not lack standing based on the failure to allege a direct injury.

ii. Speculative Nature of Damages

The Court next considers whether the damages theory alleged in Plaintiffs' Complaint is too speculative to permit Plaintiffs to have standing to pursue their claims. Defendant sets forth a number of arguments in support of its position that the calculation of damages is exceedingly tenuous and speculative. Specifically, Defendant claims that there are numerous other factors that could affect Plaintiffs' wages, such as the demand for labor in the relevant market, the supply of qualified workers, the overall profitability of the industry, and the status of the local, state, national, and international economies.

Defendant also submits that Plaintiffs have failed to allege that Defendant employs a sufficient number of illegal workers or has such a large presence in the labor market to support a conclusion that any pay discrepancies can be attributed to Defendant's allegedly illegal conduct. In particular, Defendant contends that Plaintiffs' allegation that Defendant has assisted "hundreds" of illegal workers is insufficient as a matter of economic sense to cause depressed wages. (*See* Compl. ¶ 61.) Defendant further submits that if it were paying depressed wages to its employees, Plaintiffs could simply seek employment elsewhere.

Defendant also claims that *Mendoza* is distinguishable because the defendants in that case enjoyed market power sufficient to give them the power to "define wages in this labor market, akin to a monopsony or oligopsony." *Mendoza*, 301 F.3d at 1171. Defendant maintains that Plaintiffs have not, and cannot, allege that Defendant has such market power to dictate unilaterally the labor market. Thus, Defendant contends that it is too speculative to gauge the difference between the current level of compensation and the level of compensation that would have existed but for Defendant's alleged illegal conduct.

At this stage in the litigation, however, the Court cannot agree that the damages attributable to Plaintiffs' RICO claims are so tenuous and speculative that the Court should dismiss the Complaint for lack of standing. Simply put, at this point, the Court cannot say that as a matter of law, Plaintiffs have failed to establish that Defendant's alleged RICO violations were the proximate cause of Plaintiffs' depressed wages. Of course, after some discovery it may appear that Plaintiffs' theory is too speculative. At this early juncture, however, the Court cannot dismiss the Complaint for lack of standing on this ground.

iii. Summary

In sum, the Court denies Defendant's Motion to Dismiss on the grounds that Plaintiffs lack standing under RICO to pursue their claims. Specifically, the Court finds that Plaintiffs have sufficiently alleged an injury to their "business or property" and that such injury was proximately caused by Defendant's allegedly illegal conduct. The Court next addresses Defendant's arguments in support of dismissal of Plaintiffs' state law claims.

B. Plaintiffs' Georgia RICO Claims

Plaintiffs' Complaint also includes claims for violations of Georgia RICO, O.C.G.A. § 16-14-4(a) & (c). (Compl.¶¶ 93-105). Defendant contends that Plaintiffs' Georgia RICO claims fail as a matter of law because Defendant, as a corporation, is incapable of violating that statute.

The Eleventh Circuit has recognized that "[u]nder Georgia law, a corporation *qua* corporation, cannot be held to answer for a crime, and therefore could not violate the Georgia RICO statute." *Byrne v. Nezhat*, 261 F.3d 1075, 1105 (11th Cir.2001) (citing *Cobb County v. Jones Group*, 218 Ga.App. 149, 153, 460 S.E.2d 516, 521 (1995)). "This is not to say that a corporation may disregard the law with impunity. If a crime has been committed, the agents of the corporation who are responsible are subject to prosecution." *Id.*

Because RICO predicate acts are actually criminal offenses, O.C.G.A. § 16-2-22, entitled "Criminal responsibility of corporations," applies when determining whether a corporation is vicariously liable for the actions of its employees. O.C.G.A. § 16-2-22; *Cobb County*, 218 Ga.App. at 153, 460 S.E.2d at 521. Section 16-2-22 provides that a corporation may be prosecuted for a criminal act or omission only if:

> (1) The crime is defined by a statute which clearly indicates a legislative purpose to impose liability on a corporation, and an agent of the corporation performs the conduct which is an element of the crime while acting within the scope of his office or employment and in behalf of the corporation; or
>
> (2) The commission of the crime is authorized, requested, commanded, performed, or recklessly tolerated by the board of directors or by a managerial official who is acting within the scope of his employment in behalf of the corporation.

O.C.G.A. § 16-2-22(a)(1) & (2).

Defendant first contends that Plaintiffs cannot pursue a Georgia RICO action under § 16-2-22(a)(1) because nowhere in the Georgia RICO statute does any indication of legislative purpose to impose liability on a corporation exist.

The weight of authority supports Defendant's argument. *See Clark v. Sec. Life Ins. Co. of Am.*, 270 Ga. 165, 167 n. 11, 509 S.E.2d 602, 604 n. 11 (1998) ("A corporation may also face prosecution under O.C.G.A. § 16-2- 22(a)(1) for a crime if the statute defining the crime clearly indicates a legislative purpose to impose liability on a corporation. RICO, however, in not such a statute because O.C.G.A. § 16-4-4 prohibits only 'persons' from engaging in racketeering activity."); *Cobb County,* 218 Ga.App. at 153, 460 S.E.2d at 521 ("'RICO does not contain in its definition any indication of a legislative purpose to impose criminal liability on a corporation.'") (quoting incorporated language of trial court's order). Accordingly, the Court concludes that because the Georgia RICO statute does not expressly and clearly indicate a legislative purpose to impose liability on a corporation for violations of the statute, Plaintiffs cannot avail themselves of § 16-2-22(a)(1) to impose liability for Georgia RICO violations on Defendant.

Notwithstanding the inapplicability of § 16-2-22(a)(1), the Court finds that Plaintiffs may pursue their Georgia RICO claims against Defendant under § 16-2-22(a)(2). As the Georgia Supreme Court held: "criminal liability will attach to the employer for the acts of the employee only if the 'crime is authorized, requested, commanded, performed, or recklessly tolerated by the board of directors or by a managerial official who is acting within the scope of his employment in behalf of the corporation.'" *Clark*, 270 Ga. at 167, 509 S.E.2d at 604 (quoting O.C.G.A. § 16-2-22(a)(2).) It is not fatal to Plaintiffs' Complaint that they have not alleged that Defendant's board of directors or any corporate officers acting within the scope of employment authorized, requested, commanded,

performed, or recklessly tolerated violations of Georgia RICO. On the contrary, such facts are a matter of proof; thus, Plaintiffs simply must set forth the necessary proof at trial. *State v. Military Circle Pet Ctr., No. 94, Inc.*, 257 Ga. 388, 389-90, 360 S.E.2d 248, 249 (1987) ("Although the state must prove the applicable provisions of [§ 16-2-22(a)(2)] at trial against a criminal defendant, it is not necessary that the state allege these provisions in the accusation."). At this point, therefore, the Court cannot hold that Plaintiffs' Georgia RICO claims fail as a matter of law for failure to name any managerial official, officer, or similar person of Defendant who would satisfy the requirements of § 16-2-22. Accordingly, the Court denies Defendant's Motion to Dismiss with respect to Plaintiffs' Georgia RICO claims.[8]

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[8] Defendant also contends that Plaintiffs' Georgia RICO claims fail because Plaintiffs' Complaint fails to allege that violations of 8 U.S.C.A. § 1324 constituted "racketeering activity" for purposes of Georgia RICO. (*See* Compl. ¶ 62 ("Each violation of 8 U.S.C. § 1324 constitutes an act of 'racketeering activity' under [federal RICO], 18 U.S.C. § 1961(F) [sic].").) Plaintiffs respond that Defendant has misread the Complaint, but nonetheless request leave to amend their Complaint to clarify that their Georgia RICO claims are indeed predicated on violations of § 1324.

The Court agrees with Defendant that Plaintiffs' Complaint does not state a cause of action under Georgia RICO with respect to violations of § 1324, but for a different reason than that advanced by Defendant. O.C.G.A. § 16-14-3(9)(A)(xxix) defines "racketeering activity" as including "[a]ny conduct defined as 'racketeering activity' under 18 U.S.C. Section 1961(1)(A), (B), (C), and (D)." O.C.G.A. § 16-14-3(9)(A)(xxix). That definition of racketeering activity, however, does not include those acts falling under § 1961(1)(F). Violations of § 1324 appear in subsection (F), thus acts violating § 1324 cannot qualify as predicate acts for purposes of Georgia RICO. Accordingly, the Court finds that Plaintiffs' Complaint can only allege a claim based on Georgia RICO as to 18 U.S.C.A. § 1546. The Court denies Plaintiffs' request to amend their Complaint to clarify that Plaintiffs' Georgia RICO claims are predicated on violations of § 1324 as futile.

C. Plaintiffs' Unjust Enrichment Claim

Finally, the Court addresses whether Plaintiffs have stated a claim for unjust enrichment arising under Georgia law (Compl.¶¶ 106-110). Specifically, Plaintiffs claim that Defendant's illegal conduct permits Defendant "to reap substantial wage savings" because Defendant pays Plaintiffs lower wages than what Defendant would otherwise be forced to pay. (*Id.* ¶ 107). Plaintiffs also claim that Defendant has been unjustly enriched because the hiring of illegal workers has led to a reduced number of worker's compensation claims; therefore, Defendant retains money it otherwise would have to spend on responding to worker's compensation claims. Plaintiffs further allege that Defendant, through the employment of illegal workers and at the expense of Plaintiffs, enjoys larger profits than Defendant would earn if it used legal, authorized workers. (*Id.* ¶ 109.) Consequently, Plaintiffs claim that Defendant has been unjustly enriched, and that the Court should order Defendant "to disgorge its unlawful profits or otherwise return the full amount of any wage savings and worker's compensation savings that are the direct and proximate result of [Defendant's] unlawful conduct." (*Id.* ¶ 110.)

Unjust enrichment has been defined in the following manner:

> The concept of unjust enrichment in law is premised upon the principle that a party cannot induce, accept, or encourage another to furnish or render something of value to such party and avoid payment for the value received; otherwise the party has been unjustly enriched at the expense of another and, in fairness and good conscience, must reimburse the other to the extent of the value conferred. Inherent in unjust enrichment is the requirement that the receiving party knew of the value

> being bestowed upon them by another and failed to stop the act or to reject the benefit.

Reidling v. Holcomb, 225 Ga.App. 229, 232, 483 S.E.2d 624, 626 (1997); *see also* Larkins, Ga. Contracts, § 12-3 (discussing generally unjust enrichment remedy). Recovery under a theory of unjust enrichment "presupposes the absence of a contractual agreement." *Fed. Ins. Co. v. Westside Supply Co.*, 264 Ga.App. 240, 248, 590 S.E.2d 224, 232 (2003) (citing *Ga. Tile Distribs., Inc. v. Zumpano Enters., Inc.*, 205 Ga.App. 487, 488, 422 S.E.2d 906 (1998)). "'The measure of damages under . . . unjust enrichment is based upon the benefit conferred upon the [recipient] and not the cost to render the service or cost of the goods.'" *Hollifield v. Monte Vista Biblical Gardens, Inc.*, 251 Ga.App. 124, 130-31, 553 S.E.2d 662, 669 (2001) (addition supplied) (quoting *Zampatti v. Tradebank Int'l Franchising Corp.*, 235 Ga.App. 333, 340, 508 S.E.2d 750 (1998)).

Defendant contends that Plaintiffs' unjust enrichment claim fails because Plaintiffs accepted employment at an agreed-upon rate. Plaintiffs have not alleged that Defendant failed to compensate Plaintiffs in accordance with that rate.[9] In other words, Defendant submits that unjust enrichment is inapplicable where an express contract exists for payment of an item or service, and the defendant avoids payment for that item or service. Defendant notes that in this case, the parties entered into a contract for a certain wage rate and Defendant paid wages in accordance with that contract. At this point in the litigation, however, the Court cannot agree that as a matter of law Defendant has been unjustly enriched by suppressing Plaintiffs' wages. Accordingly, the Court denies Defendant's Motion to Dismiss as to Plaintiffs' unjust en-

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[9] This argument is similar to Defendant's argument with respect to whether Plaintiffs alleged an injury to their business or property. *See supra* Part III.A.3.a.

richment claim as it relates to Defendant's savings in employing Plaintiffs at a diminished wage rate.

The Court notes, however, that Plaintiffs cannot base their claim of unjust enrichment on Defendant's alleged savings with respect to worker's compensation claims. Defendant argues, and the Court agrees, that Plaintiffs lack standing to assert a claim of unjust enrichment as to the amount of money Defendant did not have to spend in dealing with worker's compensation claims. Essentially, the Complaint alleges that because illegal workers tend to refrain from filing worker's compensation claims, and because Defendant consequently spent less money dealing with worker's compensation claims, Defendant enjoyed higher profitability. The Court cannot fathom how higher profit margins due to lower worker's compensation costs are connected in any way to Plaintiffs' receiving lower wages. That is to say, Plaintiffs' labor in no way caused lower worker's compensation costs. Consequently, the Court finds that Plaintiffs cannot claim unjust enrichment as to worker's compensation claims.

IV. Conclusion

ACCORDINGLY, the Court *DENIES IN PART* and *GRANTS IN PART* Defendant's Motion to Dismiss [25]. Specifically, the Court *DENIES* Defendant's Motion to Dismiss as to all Federal and Georgia RICO allegations in Plaintiff's Complaint, *DENIES* Defendant's Motion to Dismiss as to Plaintiffs' unjust enrichment claim as it relates to Defendant's wage savings in employing Plaintiffs at a diminished wage rate, and *GRANTS* Defendant's Motion to Dismiss as to Plaintiff's unjust enrichment claim as it relates to Defendant's savings with respect to worker's compensation claims.

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

[Filed May 27, 2004]

CIVIL ACTION FILE
NO. 4:04-CV-0003-HLM

SHIRLEY WILLIAMS, BONNIE JONES, AND LORA SISSON,
individually and on behalf of a class,
Plaintiffs,

v.

MOHAWK INDUSTRIES, INC.,
Defendant.

ORDER

This is a class action alleging violations of the federal and Georgia Racketeer Influenced and Corrupt Organizations Acts ("RICO"). The case is before the Court on Defendant's Motion for Amendment of the Court's Order on Defendant's Motion to Dismiss to Permit Interlocutory Appeal [46-1] and for Stay of Discovery [46-2].

On April 12, 2004, the Court denied in part and granted in part Defendant's Motion to Dismiss. (Order of Apr. 12, 2004.) The Court found *inter alia* that Plaintiffs had adequately alleged the existence of a RICO enterprise and proximate causation to survive Defendant's Motion to Dismiss. Defendant requests this Court's permission to file an interlocutory appeal as to those two conclusions and requests a stay of discovery pending the appeal. For the reasons set forth below, the Court grants Defendant's Motion.

Pursuant to 28 U.S.C.A. § 1292(b), a district court may permit an interlocutory appeal of an order. 28 U.S.C.A. § 1292(b) provides, in relevant part:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order.

28 U.S.C.A. § 1292(b). Thus, to certify an order for interlocutory review under § 1292, a district judge must find that: (1) the order involves a controlling question of law; (2) a substantial ground for difference of opinion exists with respect to the question of law; and (3) an immediate appeal from the order will materially advance the ultimate termination of the litigation. *Id.* Once the Court certifies an order for appeal under § 1292(b), and the United States Court of Appeals for the Eleventh Circuit grants leave to appeal, the entire order becomes subject to interlocutory appellate review. *City of Jacksonville v. Dept. of Navy*, 348 F.3d 1307, 1310 (11th Cir. 2003).

The Court first examines whether the April 12, 2004, Order involves controlling questions of law. § 1292(b). "A question of law may be deemed 'controlling' if its resolution is quite likely to affect the further course of the litigation, even if it is not certain to do so." *Sokaogon Gaming Enter. Corp. v. Tushie-Montgomery Assocs., Inc.*, 86 F.3d 565, 659 (7th Cir. 1996). Defendant contends that two "controlling" issues of law exist: (1) whether Plaintiffs have adequately pleaded the

existence of a RICO enterprise; and (2) whether Plaintiffs have adequately pleaded proximate causation with respect to injury to Plaintiffs' business or property. Those issues are "controlling," according to Defendant, because if Plaintiffs have not adequately pleaded the existence of a RICO enterprise or proximate causation, Plaintiffs' RICO claims necessarily fail.

The Court finds Defendant's argument persuasive, and agrees that those questions of law constitute "controlling questions" under § 1292(b) because the resolution of the question "is quite likely to affect the further course of the litigation." Consequently, the Court finds that the first of the § 1292(b) factors counsels in favor of permitting an interlocutory appeal.

The Court next addresses whether substantial ground for difference of opinion exist as to the Court's conclusions in its Order of April 12, 2004. Defendants rely heavily on the Seventh Circuit's opinion in *Baker v. IBP, Inc.*, 357 F.3d 685 (7th Cir. 2004), in support of its argument.

As the Court explained in its April 12, 2004, Order, relatively few reported cases exist dealing with RICO claims on behalf of employees against employers for purposed hiring of illegal workers, and only one case, *Baker*, addresses the issue of pleading the existence of a RICO enterprise in such cases. *Baker*, 357 F.3d at 691. Although the Court distinguished *Baker*, the Court nevertheless recognizes that a difference of opinion exists as to what constitutes sufficient pleading of a RICO enterprise where a plaintiff asserts a RICO claim relating to hiring of illegal aliens. Moreover, the Eleventh Circuit has not spoken directly as to whether an association of recruiters and an employer is sufficient as a matter of law to constitute a RICO enterprise. The Court therefore believes that a substantial ground for difference of opinion exists as to this issue.

Similarly, the Court believes that a substantial ground for difference of opinion exists as to the issue of proximate causation. As with pleading the existence of a RICO enterprise, few courts have addressed proximate causation in a case such as the instant action. While Plaintiffs correctly note that *Baker* "bypass[ed]" the issue of causation, that it is clear from that opinion that the Seventh Circuit is skeptical that under the facts of that case, which are similar to the facts of the instant action, it is possible to allege proximate causation. *Baker*, 357 F.3d at 692.[1] The Court thus believes that a substantial difference of opinion exists as to whether Plaintiffs have adequately alleged that their injuries were the proximate cause of Defendant's alleged racketeering activity. Consequently, the Court finds that the second § 1292(b) factor counsels in favor of permitting an interlocutory appeal of the Court's April 12, 2004, Order.

Finally, the Court examines the third prong of the § 1292(b) factors—*i.e.* whether an interlocutory appeal of the Court's April 12, 2004, Order will materially advance the ultimate termination of this litigation. Clearly, if on appeal the Eleventh Circuit determines that Plaintiffs have not adequately pleaded the existence of a RICO enterprise or proximate causation, then Plaintiffs' RICO claims necessarily fail. Furthermore, such a determination would possibly abrogate the need for substantial expenditure of resources by the Court and the parties. The Court thus believes that this third prong counsels in favor of permitting an interlocutory appeal.

In sum, the Court concludes that an interlocutory appeal of the Court's April 12, 2004, Order is appropriate. The Court will stay discovery in the case pending a ruling from the Eleventh Circuit concerning the interlocutory appeal proceedings.

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[1] Indeed, the Seventh Circuit explicitly left open the question as to whether it would follow *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163 (9th Cir. 2002).

ACCORDINGLY, the Court *GRANTS* Defendant's Motion for Amendment of the Court's Order on Defendant's Motion to Dismiss to Permit Interlocutory Appeal [46-1] and for Stay of Discovery [46-2]. The Court *AMENDS* the April 12, 2004, Order to provide that Defendant may seek interlocutory review of the April 12, 2004, Order pursuant to 28 U.S.C.A. § 1292(b). The Court *STAYS* discovery in this case until the Eleventh Circuit disposes of the interlocutory appeal. The Court notes that this stay is without prejudice as to issues regarding class certification.

IT IS SO ORDERED, this the 27th day of May, 2004.

/s/ Harold Murphy
UNITED STATES DISTRICT JUDGE

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed Jul. 28, 2004]

No. 04–90017-B

MOHAWK INDUSTRIES, INC.,
Petitioner,

versus

SHIRLEY WILLIAMS, GAIL PELREY, BONNIE JONES,
LORA SISSON, individually and on behalf of a class,
Respondents.

Petition for Permission to Appeal an Order from
the United States District Court for the
Northern District of Georgia

Before TJOFLAT, HULL and MARCUS, *Circuit Judges*.

BY THE COURT:

The Petition for Permission to Appeal pursuant to 28 U.S.C. Section 1292(b) is *GRANTED*.

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed Aug. 8, 2005]

No. 04-13740-AA

SHIRLEY WILIAMS, GALE GELFREY, BONNIE JONES, LORA SISSON, individually and on behalf of a class,
Plaintiffs-Appellees,

versus

MOHAWK INDUSTRIES, INC.,
Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before: ANDERSON, HULL and GIBSON*, *Circuit Judges*.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Frank M. Hull
UNITED STATES CIRCUIT JUDGE

---

* Honorable John R. Gibson, United States Circuit Judge for the Eighth Circuit, sitting by designation.

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed NOV 22 2006]

No. 04-13740-AA

SHIRLEY WILLIAMS, GALE PELFREY, BONNIE JONES, LORA SISSON, individually and on behalf of a class,
Plaintiffs-Appellees,

versus

MOHAWK INDUSTRIES INC.,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Georgia

ON REMAND FROM THE UNITED STATES SUPREME COURT

BEFORE: ANDERSON, HULL and GIBSON,* Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the. Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:
/s/ Frank M. Hull
UNITED STATES CIRCUIT JUDGE

* Honorable John R. Gibson, U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

APPENDIX I

FEDERAL STATUTES

18 U.S.C. § 1961: Definitions

As used in this chapter—

* * * *

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity ....

* * * *

18 U.S.C. § 1962: Prohibited activities

* * * *

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

* * * *

18 U.S.C. § 1964: Civil remedies

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person

that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

APPENDIX J

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 04-13740-AA

SHIRLEY WILLIAMS, GALE PELFREY, BONNIE JONES, and LORA SISSION, individually and on behalf of a class,
Plaintiffs-Appellees,

v.

MOHAWK INDUSTRIES, INC.,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ROME DIVISION

PETITION FOR REHEARING *EN BANC* OF MOHAWK INDUSTRIES, INC.

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Counsel for Appellant

* * * *

II. THE ALLEGED ENTERPRISE IS LEGALLY INSUFFICIENT AND THE PANEL'S DECISION CONFLICTS WITH DECISIONS OF OTHER CIRCUITS.

Plaintiffs alleged that Mohawk, through its unlawful hiring, participated in the conduct of "an association-in-fact enterprise" consisting of "Mohawk and the recruiters" who allegedly provide Mohawk with workers. Compl. ¶ 79. Mohawk argued that the enterprise allegations failed as a matter of law. The panel upheld the sufficiency of these enterprise allegations, but candidly acknowledged that its decision "puts our circuit in conflict with the Seventh Circui[t]." *Williams II* at 13 (citing *Baker* v. *IBP, Inc.*, 357 F.3d 685 (7th Cir. 2004)). This Court should grant *en banc* review to resolve this split with the Seventh Circuit and other circuit courts. *See* Fed. R. App. P. 35(b)(1)(B). Indeed, the fact that this question is one of exceptional importance, and deserving *en banc* review, is evident from the fact that the Supreme Court has previously granted certiorari on it in this case.

The panel's holding that Plaintiffs have adequately pled a RICO enterprise is misguided for two reasons. *First*, the alleged enterprise falls outside of the plain language of RICO's enterprise definition. *Second*, Plaintiffs have not alleged participation in the conduct of an enterprise distinct from Mohawk itself.

1. Plaintiffs' alleged association-in-fact enterprise consists of Mohawk and other companies that allegedly contract with Mohawk to provide recruiting services. The panel upheld the legal sufficiency of this alleged enterprise. Citing this Court's prior decision in *United States* v. *Goldin Industries, Inc.*, the panel explained that a RICO association-in-fact enterprise may consist of "'an association of individual *entities*.'" *Williams II* at 10 (emphasis added) (quoting

Goldin, 219 F.3d 1271, 1275 (11th Cir. 2000)). *Goldin* reiterated a similar holding in *United States* v. *Navarro-Ordas*, 770 F.2d 959, 969 (11th Cir. 1985).

This Court should grant en banc review and overrule the holdings in *Goldin* and *Navarro-Ordas* that a "a group of *corporations* can be a 'group of *individuals* associated in fact.'" *Navarro-Ordas*, 770 F.2d at 969 (emphasis added). This expansive interpretation of RICO's enterprise definition is contradicted by the plain language of that definition. RICO defines the term "enterprise" to "includ[e] any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). Under RICO, an association-in-fact enterprise is limited to a "group of individuals"—not a group of corporations like the one alleged here.[7]

The statutory term "individuals" encompasses only natural persons, not corporations. In ordinary usage, the noun "individual" means "a single human being as contrasted with a social group or institution." *See Webster's Third New Int'l Dictionary* 1152 (1969). That plain meaning is reinforced by § 1961 itself. For example, the first clause in § 1961(4) separately lists "individual" and "corporation," indicating that Congress did not intend the former to encompass the latter. *See* § 1961(4). Indeed, when confronted with this issue when this case was before the Supreme Court, *the United States did not contend* that corporations were "individuals" within the meaning of RICO's enterprise definition.[8]

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[7] Mohawk fully set forth all of its arguments in support of this position in its merits briefs in the Supreme Court. *See* Pet. Br. at 12-26, 2006 WL 282167; Pet. Reply at 1-8, 2006 WL 951123. Due to space limitations, only some of those arguments are set forth below.

[8] Indeed, at oral argument in this case, many Justices recognized the force of these arguments. See Tr. of Oral Arg. at *11-17, No. 05-465 (Apr. 26, 2006), 2006 WL 1194498; *id.* at *31 (Roberts, C.J.) (noting that "whatever an individual is [in § 1961(4)] it's different from a corpora-

Instead, the focus before the Supreme Court was on whether the definition of "enterprise"—in light of its introduction by the term "includes"—was comprehensive or instead merely provided a list of enterprise examples that could be expanded upon. RICO itself, however, provides powerful evidence that Congress used "includes" to introduce comprehensive definitions. The term "includes" is used in three other RICO definitions—all of which are comprehensive on their face. *See* 18 U.S.C. § 1961(3), (9), (10) (using "includes" to introduce comprehensive definitions of "person," "documentary material," and "Attorney General"). Moreover, when Congress meant to use "includes" merely to provide examples, it followed the term by the phrase "but not limited to." *See* 18 U.S.C. § 1964(a). Neither *Goldin* and *Navarro-Ordas* took account of this weighty statutory construction evidence. Rehearing *en banc* would give this Court the opportunity properly to interpret RICO's enterprise definition with the benefit of a more thorough consideration of the issue.

2. The Panel's opinion is erroneous in another important respect: it concludes that Mohawk's alleged hiring constitutes participation in an enterprise distinct from Mohawk itself. *Williams II* at 9-15. RICO makes it unlawful for "any person employed by or associated with any enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. § 1962(c). The Supreme Court has explained that this provision of RICO requires that (i) the RICO defendant be distinct from the alleged enterprise, see *Cedric Kushner Promotions, Ltd.* v. *King*, 533 U.S. 158, 161, 121 S. Ct. 2087, 2090 (2001) (a plaintiff must prove "an 'enterprise' that is not simply the same 'person' referred to by a different name"); and (ii) that the defendant "participated in the conduct of the

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tion"); *id.* at *32 (Kennedy, J.) (noting that § 1961(4)'s use of the word "individual" "doesn't sound like a corporation").

'*enterprise's* affairs' not just [its] *own* affairs," *Reves* v. *Ernst & Young*, 507 U.S. 170, 185, 113 S. Ct. 1163, 1173 (1993).

Plaintiffs' allegations, however, fail to comport with these principles. As the Seventh Circuit recognized in a materially identical RICO case alleging depressed wages resulting from unlawful hiring, plaintiffs' averments only amount to an allegation that "IBP [the defendant] operates *itself* unlawfully—it is IBP that supposedly hires, harbors, and pays the unlawful workers, for the purpose of reducing its payroll." *See Baker* v. *IBP, Inc.*, 357 F.3d 685, 691 (7th Cir.), *cert. denied*, 125 S. Ct. 412 (2004). In short, the Seventh Circuit correctly held that such allegations do not satisfy RICO's requirements of participation in the conduct of a distinct enterprise. The panel opinion erroneously reaches the opposite conclusion and creates a split (which it acknowledges) with the Seventh Circuit.

The circuit split created by the panel's decision, however, is much deeper. Numerous other circuit courts have held that an enterprise consisting of a corporation plus agents performing services does not constitute a distinct enterprise.[9] The panel's contrary holding permits Plaintiffs to plead around the restrictions imposed by the distinctness requirement simply by adding an outside contractor to the alleged enterprise.

* * * *

---

[9] *See, e.g., Fitzgerald* v. *Chrysler Corp.*, 116 F.3d 225, 228 (7th Cir. 1997) (a corporation, together with its agents engaging in normal business activities do not constitute an enterprise); *Discon, Inc.* v. *Nynex Corp.*, 93 F.3d 1055, 1064 (2d Cir. 1996) (finding that an enterprise consisting of several entities within a single corporate structure and their "'attorneys, accountants and other agents'" failed the distinctness test), *vacated on other grounds*, 525 U.S. 128, 119 S. Ct. 493 (1998); *Brittingham* v. *Mobil Corp.*, 943 F.2d 297, 303 (3d Cir. 1991) ("enterprise" consisting of a defendant corporation and advertising agencies acting on its behalf is not distinct from the corporation itself), *overruled on other grounds, Jaguar Cars, Inc.* v. *Royal Oaks Motor Co.*, 46 F.3d 258 (3d Cir. 1995).

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

[Filed Jan. 5, 2004]

Civil Action File No. 4 04-CV-03
Complaint—Class Action

SHIRLEY WILLIAMS, GALE PELFREY, BONNIE JONES and LORA SISSON, individually and on behalf of a class,
Plaintiffs,

vs.

MOHAWK INDUSTRIES, INC.,
Defendant.

COMPLAINT

Plaintiffs Shirley Williams ("Williams"), Gale Pelfrey ("Pelfrey"), Bonnie Jones ("Jones") and Lora Sisson ("Sisson"), individually and on behalf of a class, bring this action against Defendant Mohawk Industries, Inc. ("Mohawk"):

I. SUMMARY OF CLAIMS

1.

This is a class action under the federal and Georgia Racketeer Influenced and Corrupt Organizations ("RICO") acts. The members of the class are current and former hourly employees of Mohawk whose wages have been depressed by Mohawk's employment and harboring of large numbers of illegal workers. Plaintiffs seek injunctive and monetary relief on behalf of Mohawk's legally-employed hourly workers in Georgia.

2.

Mohawk is the second largest carpet and rug manufacturer in the United States. In 2002, its carpet and rug net sales were approximately $3.2 billion. Mohawk employs approximately 31,780 persons, most of whom are employed in Northwest Georgia. Mohawk owns or leases at least twenty-six facilities in Georgia.

3.

Mohawk has, in its Georgia facilities, engaged in the widespread employment of illegal workers, *i.e.*, workers who are not authorized to be employed in the United States. By employing and harboring illegal workers, Mohawk is able to reduce labor costs by depressing wages for its hourly workers and discouraging claims for workers compensation.

4.

Mohawk's conduct violates the federal Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* ("federal RICO"), and Georgia's Racketeer Influenced and Corrupt Organizations Act, O.C.G.A. § 16-14-1 *et seq.* ("Georgia RICO"), as more fully set forth below.

II. PARTIES, JURISDICTION AND VENUE

5.

Plaintiff Gale Pelfrey is a citizen of Georgia and resides in the Northern District of Georgia. She is eligible to be employed in the United States and is a former hourly employee of Mohawk.

6.

Plaintiff Shirley Williams is a citizen of Georgia and resides in the Northern District of Georgia. She is eligible to be employed in the United States and is a former hourly employee of Mohawk.

7.

Plaintiff Bonnie Jones is a citizen of Georgia and resides in the Northern District of Georgia. She is eligible to be employed in the United States and is a current hourly employee of Mohawk.

8.

Plaintiff Lora Sisson is a citizen of Georgia and resides in the Northern District of Georgia. She is eligible to be employed in the United States and is a former hourly employee of Mohawk.

9.

Defendant Mohawk is a Delaware corporation with its principal place of business in Calhoun, Georgia. Mohawk may be served by service on its registered agent for service of process, Salvatore J. Perillo, Post Office Box 12069, South Industrial Boulevard, Calhoun, Georgia 30703.

10.

Mohawk is subject to the personal jurisdiction of this Court.

11.

This Court has subject matter jurisdiction over this case pursuant to 18 U.S.C. § 1964(c), 28 U.S.C. § 1332 (federal question) and 28 U.S.C. § 1367 (ancillary jurisdiction).

12.

Venue is proper in this district, pursuant to 28 U.S.C. § 1391(b), as Mohawk resides in this district and events giving rise to Plaintiffs' claims occurred in this district. Venue is also proper in this district pursuant to 18 U.S.C. § 1965, as Mohawk resides, is found in and transacts its affairs in the Northern District of Georgia.

III. FACTS

Mohawk's Hiring and Harboring of Illegal Workers

13.

Mohawk employs many thousands of hourly paid workers in its operations in North Georgia.

14.

In an effort to keep labor costs as low as possible, Mohawk has engaged in the illegal hiring of persons who are not eligible for employment in the United States.

15.

Mohawk has accepted for employment and continued to employ workers that it knew or had reason to know were not authorized to work in the United States.

16.

Mohawk has knowingly and recklessly accepted as proof of eligibility for employment false documents or documents that do not match the identity of the person presenting them. For example, Mohawk has accepted drivers' licenses and other documents that obviously depict a person different than the person presenting the document as proof of eligibility for employment.

17.

Mohawk also has knowingly and recklessly accepted as proof of eligibility for employment documents that reflect successive different names for a single person. Indeed, Mohawk frequently employs illegal workers who (a) first present eligibility documents that reflect one name, (b) work at Mohawk for some period of time, (c) leave their jobs at Mohawk, and then (d) return to work at Mohawk and present Mohawk with identification and work eligibility documents showing a different name.

18.

In some instances, when illegal workers have informed Mohawk that they would return to their countries of origin, Mohawk supervisors have encouraged these employees to return to the United States and reapply for work at Mohawk in violation of United States law.

19.

Although Mohawk was and is aware that numerous employees have used or are using identities different from those they had previously used while employed at Mohawk, Mohawk has accepted and continues to accept new identification and work authorization documents that it knew or had reason to know were false or obtained by false statements from these persons.

20.

Mohawk employees and/or supervisors have destroyed eligibility documents showing that workers have used different names and identification papers in an effort to conceal Mohawk's employment and harboring of illegal workers.

21.

Mohawk employees and supervisors have stated that they are aware that illegal workers can easily obtain false identification and work authorization documents.

22.

Mohawk employees have traveled to the United States border, including areas near Brownsville, Texas, to recruit undocumented aliens that recently have entered the United States in violation of federal law. These employees and other persons have transported undocumented aliens from these border towns to North Georgia so that those aliens may procure employment at Mohawk. Mohawk has made various

incentive payments to employees and other recruiters for locating workers that Mohawk eventually employs and harbors.

23.

Various recruiters, including Mohawk employees, have provided housing to these illegal workers upon their arrival in North Georgia and have helped them find illegal employment with Mohawk.

24.

Mohawk has conducted occasional audits of its workforce and discovered numerous illegal workers within that workforce. Although these infrequent audits often confirm the presence of large numbers of illegal workers and therefore put Mohawk on further notice that it is employing and harboring illegal workers, Mohawk has not increased the frequency of these audits.

25.

Even when Mohawk terminates illegal workers after discovering that they are not authorized to work in the United States, many of those discharged illegal workers soon return to work at Mohawk under different names. For example, earlier this year, Mohawk discharged three employees that Mohawk had discovered to be illegally working in one of its facilities. Within two months after their discharge, Mohawk re-hired these same employees under different names to work on different shifts in the same facility.

26.

This practice of "recycling" illegal workers is widespread at Mohawk.

27.

Law enforcement personnel have raided Mohawk facilities in pursuit of undocumented aliens. On some of these occasions, illegal workers have hidden in barrels or other con-

tainers or run from the facilities being raided. This conduct has put Mohawk on further notice of the presence of large numbers of illegal workers in its workforce.

28.

Mohawk employees and supervisors have assisted illegal workers in attempting to evade detection by law enforcement personnel.

29.

Law enforcement authorities have arrested illegal workers at Mohawk facilities.

30.

Law enforcement authorities have found undocumented aliens in possession of Mohawk paychecks or identification badges and fraudulent identification documents.

31.

Mohawk supervisors have stated that they prefer hiring illegal workers because they do not complain about working conditions or submit claims for workers' compensation.

32.

Because illegal workers typically have no intention of filing federal tax returns, many illegal workers inflate their claimed exemptions to attempt to avoid withholding taxes. Many of Mohawk's illegal workers have inflated their claimed exemptions to avoid federal income tax withholding. This conduct has further put Mohawk on notice that large numbers of its workforce are not authorized for employment in the United States.

33.

Mohawk's employment and harboring of large numbers of illegal workers has enabled Mohawk to depress wages and thereby to pay all of its hourly employees, including legally

employed workers who are members of the class, wages that are lower than they would be if Mohawk did not engage in this illegal conduct.

34.

Mohawk is the second largest carpet manufacturer in the United States and one of the largest employers in North Georgia. Mohawk employs tens of thousands of hourly workers in North Georgia.

35.

Mohawk's widespread employment and harboring of illegal workers has substantially and unlawfully increased the supply of workers from which Mohawk makes up its hourly workforce. This unlawful expansion of the labor pool has permitted Mohawk to depress the wages that it pays all its hourly employees, including the Plaintiffs and all Class members. If Mohawk had complied with the law by limiting its hourly workforce to those workers authorized to work in the United States, Mohawk would have had to pay higher wages to the Plaintiffs and the members of the Class.

36.

One purpose and intended effect of Mohawk's widespread employment and harboring of illegal workers is to deprive Mohawk's hourly workforce of any individual or collective bargaining power. Because Mohawk knows that many of its workers are not authorized to reside or work in the United States, Mohawk knows that those illegal workers are beholden to Mohawk. Mohawk is further aware that its undocumented workers have virtually no effective means to complain about the terms of their employment.

37.

Mohawk also is aware that its illegal employees are unlikely to file worker's compensation claims against Mohawk. As a direct and proximate result of Mohawk's employment

and harboring of illegal workers, Mohawk has been able to save substantial sums of money in worker's compensation liability that it would have incurred if it had not violated the law.

38.

As a direct and proximate result of Mohawk's employment and harboring of illegal workers, Plaintiffs and all members of the Class have earned wages below the wages they would have earned if Mohawk had complied with the law.

IV. CLASS ACTION ALLEGATIONS

39.

Plaintiffs bring this action on behalf of all persons legally authorized to be employed in the United States who are or have been employed by Mohawk in hourly wage positions in Georgia at any time from January 5, 1999 to the present (the "Class"). The "Class Period" is from January 5, 1999 to the present.

40.

The Class is so numerous that joinder of all Class members is impracticable. Plaintiffs believe the Class contains many thousands of members, and the actual number of Class members can be ascertained through discovery.

41.

There are numerous questions of law and fact common to the Class. Those questions include, but are not limited to:

a. How many persons who are not authorized to be employed in the United States has Mohawk employed in hourly wage positions during the Class Period?

b. Has Mohawk knowingly or with reckless disregard employed workers who are not authorized for employment in the United States during the Class Period?

c. Has Mohawk knowingly or recklessly harbored undocumented aliens in the United States in violation of federal law during the Class Period?

d. To what extent has Mohawk's employment and harboring of persons who are not authorized to be employed in the United States in hourly wage positions depressed the wages Mohawk provides to legal hourly employees?

e. Is Mohawk part of an "enterprise" under the federal RICO statute? and

f. Has Mohawk engaged in a pattern of racketeering activity under the federal RICO statute or acquired and maintained and [sic] interest in a pattern of racketeering activity under the Georgia RICO statute?

42.

The claims of the Plaintiffs are typical of the claims of the Class. Plaintiffs are or were hourly workers whose wages have been depressed by Mohawk's employment and harboring of illegal workers. Plaintiffs have no interests that are antagonistic or adverse to the other Class members.

43.

Plaintiffs were injured by direct and proximate reason of Mohawk's illegal conduct.

44.

Plaintiffs will fairly and adequately protect the interests of the class.

45.

Plaintiffs are adequate representatives of the Class. Plaintiffs are each authorized for employment in the United States and are or were hourly Mohawk workers, whose wages have been depressed by Mohawk's employment and harboring of

illegal workers. Plaintiffs have retained counsel that are experienced in class action litigation, RICO litigation and complex litigation. Accordingly, Plaintiffs will fairly and adequately protect and represent the interests of the Class.

46.

Plaintiffs seek certification of a class, alternatively, under Fed. R. Civ. P. 23(b) (2) or 23(b) (3), or a combination thereof.

47.

Mohawk's employment and harboring of illegal workers has the effect of depressing wages and benefits to the detriment of all members of the Class. Accordingly, declaratory and injunctive relief that prevents Mohawk from continuing to employ or harbor illegal workers is appropriate on a class wide basis.

48.

The questions of law and fact common to all members of the Class predominate over any questions that may affect only individual members of the Class.

49.

A class action is a superior method of adjudicating the Class members' claims because individual actions would unnecessarily burden the Court and create the risk of inconsistent results.

50.

Given the significant expense required to prosecute the foregoing claims against Mohawk, the costs of individual actions would exceed or consume the amount recovered in any individual action. The expense of pursuing individual actions will require individual members of the Class to forego their individual claims against Mohawk if they are not permitted to pursue those claims as a Class.

51.

Plaintiffs are not aware of any litigation concerning this controversy that has already been initiated by or against any members of the Class.

52.

Because both Mohawk and the large majority of the Class members reside in this district and many of the events giving rise to this action took place in this district, it is both desirable and efficient to concentrate the litigation of these claims in this particular forum.

53.

This action is manageable because the evidence proving that Mohawk is engaging in the alleged conduct is common to the Class. Furthermore, the identities of the Class members are known to Mohawk.

V. MOHAWK HAS ENGAGED IN A PATTERN OF RACKETEERING ACTIVITY

54.

Mohawk is engaged in an ongoing pattern of racketeering activity as defined by 18 U.S.C. § 1961(5).

55.

The federal RICO pattern of racketeering activity engaged in by Mohawk consists of more than two acts of racketeering activity, the most recent of which occurred within ten years after the commission of a prior act of racketeering activity.

56.

Mohawk is engaged in an ongoing pattern of racketeering activity as defined by O.C.G.A. § 16-14-3(8).

57.

The Georgia RICO pattern of racketeering activity engaged in by Mohawk consists of more than two acts of racketeering activity, the most recent of which occurred within four years after the commission of a prior act of racketeering activity.

58.

For purposes of federal RICO, the racketeering activity includes an open and ongoing pattern of violations of Section 274 of the Immigration and Nationality Act, 8 U.S.C. § 1324(a).

59.

Specifically Mohawk has violated and continues to violate 8 U.S.C. § 1324(a)(3)(A), which makes it a federal crime to: "knowingly hire[] for employment at least 10 individuals with actual knowledge that the individuals are aliens . . ." during a 12 month period. Mohawk has violated this provision of the Act, including by employing more than 10 aliens per year each year for the last four years, knowing that each such person was (a) smuggled or otherwise brought into the United States in violation of U.S. law; (b) illegally harbored once in the United States; (c) not lawfully admitted to the United States for permanent residence; and/or (d) not authorized for employment in the United States.

60.

Mohawk has also violated and continues to violate 8 U.S.C. § 1324(a)(1)(A)(iii), which makes it a federal crime to "conceal,[], harbor[] or shield from detection, or attempt[] to conceal, harbor or shield from detection . . ." aliens who have entered the U.S. illegally. Mohawk has violated this provision by (a) knowingly employing illegal aliens within its factories, warehouses and other facilities in Georgia and/or (b) taking steps to shield those illegal aliens from detection, by, among other things, helping them evade detection during law enforcement searches and inspections.

61.

Furthermore, Mohawk has also violated and continues to violate 8 U.S.C. § 1324(a)(1)(A)(iv), which prohibits any person or entity from "encourag[ing] or induc[ing] an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law[.]" By knowingly or recklessly employing and harboring undocumented aliens in its Georgia facilities, Mohawk has helped hundreds of aliens to avoid detection and enabled them to remain in the United States in violation of U.S. law. And by successively hiring and employing the same undocumented aliens under different names and accepting false identification and work authorization documents that reflect different identities for these aliens, Mohawk has knowingly or recklessly encouraged any undocumented aliens that are discovered to return to the United States and to their employment at Mohawk in violation of United States law.

62.

Each violation of 8 U.S.C. § 1324 constitutes an act of "racketeering activity" under the federal Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961(F).

63.

For purposes of both federal and Georgia RICO, the racketeering activity also includes open and ongoing violations of 18 U.S.C. § 1546(a), including Mohawk's acceptance of identification documents and other documents that authorize employment in the United States that Mohawk knew or had reason to know were not lawfully issued for the bearer's use, were false and/or were obtained by false statements.

64.

Mohawk has also violated and continues to violate 18 U.S.C. § 1546(b) by using identification documents that Mo-

hawk knew or had reason to know were false and/or not lawfully issued to the bearer to falsely verify the eligibility of the persons presenting them to work at Mohawk, and recording information from those documents on I-9 forms.

65.

Each violation of 18 U.S.C. § 1546 constitutes "racketeering activity" under the federal Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961(B).

66.

Each violation of 18 U.S.C. § 1546 also constitutes "racketeering activity" under the Georgia Racketeer Influenced and Corrupt Organizations Act. O.C.G.A. § 16-14-3(9)(A)(xxix).

The Acts of Racketeering Activity Committed by Mohawk Are Related

67.

The acts of racketeering activity committed by Mohawk have the same or similar methods of commission in that they involve the knowing employment of illegal workers, the concealment, harboring and shielding from detection of illegal workers, and the acceptance or use of fraudulent documents in connection with the hiring of illegal workers.

68.

The acts of racketeering activity committed by Mohawk have the same or similar objective: the reduction of wages paid to Mohawk's hourly workforce.

69.

The acts of racketeering activity committed by Mohawk have the same or similar victims, including the plaintiffs and the other members of the Class.

70.

The acts of racketeering activity committed by Mohawk are otherwise related by distinguishing characteristics including, but not limited to, the involvement of Mohawk, illegal workers, and other members of the association-in-fact enterprise identified in paragraphs 76-84.

The Acts of Racketeering Activity Committed by Mohawk Involve a Distinct Threat of Long-Term Racketeering Activity

71.

Mohawk's acts of racketeering activity involve a distinct threat of long-term racketeering activity.

72.

Mohawk's practice of knowingly employing, harboring, concealing and shielding illegal workers and Mohawk's acceptance and use of documents that are not lawfully issued for the use of the possessor or are false has continued for years, is ongoing at the present time and will continue into the future unless halted by judicial intervention.

73.

Mohawk's knowing employment, harboring, concealing and shielding of illegal workers and its acceptance and use of documents that are not lawfully issued for the use of the possessor or are false is part of its regular way of conducting business.

74.

Mohawk has committed hundreds, and probably thousands, of violations of 8 U.S.C. § 1324 and 18 U.S.C. § 1546 as part of its pattern of racketeering activity.

75.

Mohawk's knowing employment, harboring, concealing and shielding of illegal workers and its acceptance and use of

documents that are not lawfully issued for the use of the possessor or are false is so pervasive that illegal workers now constitute a majority of the work force in many of Mohawk's facilities in North Georgia.

VI. THE ENTERPRISE

76.

Mohawk has engaged in an open and ongoing pattern of violations of 8 U.S.C. § 1324 and 18 U.S.C. § 1546 during the last five years through its participation in an association-in-fact enterprise with third party employment agencies and other recruiters, including Temporary Placement Services ("TPS"), that supply Mohawk with illegal workers. Each recruiter is paid a fee for each worker it supplies to Mohawk, and some of those recruiters work closely with Mohawk to meet its employment needs by offering a pool of illegal workers who can be dispatched to a particular Mohawk facility on short notice as the need arises. Some recruiters find workers in the Brownsville, Texas area and transport them to Georgia. Others, like TPS, have relatively formal relationships with the company in which they employ illegal workers and then loan or otherwise provide them to Mohawk for a fee. These recruiters are sometimes assisted by Mohawk employees who carry a supply of social security cards for use when a prospective or existing employee needs to assume a new identity.

77.

The recruiters and Mohawk share the common purpose of obtaining illegal workers for employment by Mohawk. The enterprise has worked in this fashion continuously over at least the last five years.

78.

Mohawk participates in the operation and management of the affairs of the enterprise, which exists for Mohawk's benefit.

79.

This association of Mohawk and the recruiters constitutes an association-in-fact enterprise pursuant to 18 U.S.C. § 1961(4).

80.

The enterprise affects interstate commerce in a variety of ways.

81.

The enterprise affects interstate commerce in that the illegal workers employed by Mohawk travel in international and interstate commerce in order to reach Mohawk facilities in North Georgia.

82.

The enterprise also affects interstate commerce in that it reduces the income of the legal workers who are still part of the Mohawk hourly workforce.

83.

The enterprise also affects interstate commerce in that Mohawk, a member of the enterprise, is directly engaged in the production, distribution and acquisition of goods and services in interstate commerce.

84.

Mohawk accepted and retained the benefits of the acts of racketeering activity, thereby ratifying the conduct of its managers, employees, and the members of the enterprise who assisted it in committing those acts of racketeering activity.

VII. MOHAWK HAS CAUSED PLAINTIFFS' WAGES TO BE DEPRESSED

85.

Mohawk's violations of federal and Georgia RICO proximately have caused the wages of Pelfrey, Williams, Jones, Sisson and all other members of the Class to be depressed below what they would have been in a labor market comprised of legally employed workers.

86.

Pelfrey, Williams, Jones, Sisson and the Class have suffered an injury to their "business or property," *i.e.* lost wages, as a direct result of Mohawk's violations of federal RICO, and injury as a result of Mohawk's violations of Georgia RICO.

87.

Mohawk's unlawful conduct has allowed Mohawk to earn or retain significant funds to which it is not entitled. For example, Mohawk's widespread employment of illegal workers has permitted Mohawk to depress the wages for its hourly workers and to reduce the expenses it incurs as a result of worker's compensation claims. These savings contribute to Mohawk's profit margins and provide the financial motive for Mohawk's hiring of illegal workers.

COUNT I

(Violation of 18 U.S.C. § 1962(c))

88.

Plaintiffs reallege and incorporate by reference herein the allegations set forth in paragraphs 1-87 as if fully restated hereinafter.

89.

The foregoing conduct constitutes a violation of 18 U.S.C. § 1962(c).

90.

Plaintiffs have been injured in their property by reason of Mohawk's violations of 18 U.S.C. § 1962(c).

91.

The injuries suffered by plaintiffs were caused by Mohawk's violations of 18 U.S.C. § 1962(c).

92.

Pursuant to 18 U.S.C. § 1964(c), plaintiffs are entitled to recover threefold the damages they have sustained and their costs of suit, including reasonable attorney's fees.

COUNT II

(Violation of O.C.G.A. § 16-14-4(a))

93.

Plaintiffs reallege and incorporate by reference herein the allegations set forth in paragraphs 1-92 as if fully restated hereinafter.

94.

Mohawk has acquired and maintained an interest in and control of personal property, including money, through a pattern of racketeering activity.

95.

Plaintiffs have been injured by reason of Mohawk's violation of O.C.G.A. § 16-14-4(a) and are entitled to recover three times the actual damages sustained.

96.

In addition, Mohawk's actions showed wilfull misconduct, malice, fraud, wantonness, oppression and an entire want of care that raises the presumption of conscious indifference to consequences and specific intent to cause harm, entitling plaintiffs to receive punitive damages sufficient to deter, pen-

alize, or punish Mohawk in light of the circumstances of the case.

97.

Plaintiff are also aggrieved persons within the meaning of O.C.G.A. § 16-14-6(b). As a result, Plaintiffs are entitled to appropriate preliminary and permanent injunctive relief.

98.

Pursuant to O.C.G.A. § 16-14-6(a), plaintiffs ask the Court to issue appropriate orders and judgment requiring Mohawk to cease its illegal conduct and imposing reasonable restrictions upon Mohawk's future activities sufficient to prohibit future violations of the law.

COUNT III

(Violation of O.C.G.A. § 16-14-4(c))

99.

Plaintiffs reallege and incorporate by reference herein the allegations set forth in paragraphs 1-98 as if fully restated hereinafter.

100.

Mohawk has endeavored to violate O.C.G.A. § 16-14-4(a), in violation of O.C.G.A. § 16-14-4(c).

101.

Mohawk has also conspired with TPS and other recruiters, known and unknown, to violate O.C.G.A. § 16-14-4(a), in violation of O.C.G.A. § 16-14-4(c).

102.

Mohawk has committed overt acts, which are also acts of racketeering activity, in furtherance of the conspiracy. These overt acts include violations of 18 U.S.C. § 1546.

103.

Mohawk has also committed overt acts in furtherance of the conspiracy by having Mohawk employees travel in interstate commerce for the purpose of assisting Mohawk in hiring illegal workers.

104.

Mohawk's actions show wilfull misconduct, malice, fraud, wantonness, oppression and an entire want of care that would raise the presumption of conscious indifference to consequences, and specific intent to cause harm, entitling plaintiffs to receive punitive damages sufficient to deter, penalize or punish Mohawk.

105.

Mohawk's violations of federal and Georgia RICO are intended to and do in fact depress wages, and the Class is the direct victim of these violations.

COUNT IV

(Unjust Enrichment in Violation of Georgia Law)

106.

Plaintiffs reallege and incorporate by reference herein the allegations set forth in paragraphs 1-105 as if fully restated hereinafter.

107.

Mohawk's employment and harboring of illegal workers has had the purpose and effect of depressing the wages paid to Mohawk's hourly workers who are eligible for employment in the United States. Mohawk's conduct therefore is intended to and has the effect of permitting Mohawk to reap substantial wage savings.

108.

Mohawk's employment and harboring of illegal workers also has had the purpose and effect of reducing the number of worker's compensation claims that Mohawk receives. Mohawk supervisors have stated that they prefer hiring illegal workers in part because they do not submit worker's compensation claims. Mohawk's conduct therefore is intended to and has the effect of permitting Mohawk to limit the amount it must spend to respond to worker's compensation claims.

109.

The savings that Mohawk has been able to achieve and continues to achieve through its employment and harboring of illegal workers have been unjustly and inequitably conferred on Mohawk at the expense of its hourly workers who are authorized for employment in the United States, including Plaintiffs and all other members of the Class. These cost savings permit Mohawk to earn larger profits than it would be able to earn if it did not employ and harbor illegal workers.

110.

Under the circumstances, Mohawk has been unjustly enriched at the expense of the Plaintiffs and all the members of the Class. Mohawk therefore should be ordered to disgorge its unlawful profits or otherwise return the full amount of any wage savings and worker's compensation savings that are the direct and proximate result of Mohawk's unlawful conduct.

XIII. PRAYER FOR RELIEF

Plaintiffs Pelfrey, Williams, Jones and Sisson demand judgment and other relief as follows:

A. Certification of a Class pursuant to Fed. R. Civ. P. 23;

B. Judgment in an amount equal to three times the actual damages sustained by the Class, pursuant to 18 U.S.C. § 1964(c);

C. Reasonable attorney's fees, pursuant to 18 U.S.C. § 1964(c);

D. Judgment in an amount equal to three times the actual damages sustained by the Class, pursuant to O.C.G.A. § 16-14-6(c);

E. Attorneys' fees in the trial and appellate courts and costs of investigation and litigation reasonably incurred, pursuant to O.C.G.A. § 16-14-6(c);

F. Appropriate orders and judgments prohibiting Mohawk from engaging in the violations of law alleged herein, pursuant to O.C.G.A. § 16-14-4(a) and (b);

G. Judgment in an amount to be proven at trial that requires Mohawk to disgorge any unlawful profits or otherwise return the full amount of its unjust enrichment;

H. Trial by jury; and

I. Such other relief as the Court deems just and proper.

This 6th day of January, 2004.

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No. 06-873

FILED
JAN 22 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The Supreme Court of the United States

MOHAWK INDUSTRIES, INC.,

Petitioner,

v.

SHIRLEY WILLIAMS, GALE PELFREY, BONNIE JONES, and LORA SISSON, Individually and on behalf of a class,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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INTRODUCTION

This is Mohawk Industries, Inc.'s second Petition for a writ of certiorari to review a 2004 district court decision denying a motion to dismiss the plaintiffs' federal RICO claims. After an interlocutory appeal to the Eleventh Circuit Court of Appeals, this Court granted certiorari last Term to consider some of the enterprise questions Mohawk reiterates in this second Petition. But after full briefing and oral argument, the Court concluded that it had made a mistake by granting certiorari and dismissed the writ as improvidently granted. *See Mohawk Industries, Inc. v. Williams*, 126 S. Ct. 2016 (2006), reproduced at Pet. App. 31a. The Petition offers the Court no reason to revisit that decision or this case a second time.

REASONS FOR DENYING THE PETITION

The Petition argues that the Eleventh Circuit's decision in *Williams v. Mohawk Industries, Inc.*, 465 F.3d 1277 (11th Cir. 2006) ("*Williams II*") raises three separate questions worthy of this Court's review. In truth, none of the Questions Presented meets the Court's guidelines for granting certiorari. *See* Sup. Ct. Rule 10. Moreover, it is worth recalling that Mohawk's prior Petition, in Case No. 05-465, raised virtually all of the substantive issues that Mohawk now presses in this second Petition. Although Mohawk frames the first Question Presented as the proper application of a decision from last Term, that question merely subsumes and recycles the same proximate cause

arguments Mohawk raised in its initial Petition.[1] Similarly, the enterprise issues collected under the second Question Presented repeat the arguments this Court considered but declined to address when it dismissed certiorari last Term.[2] And although Mohawk has added a third Question Presented concerning the definition of an injury to business or property under 18 U.S.C. § 1964(c), even that issue was presented in Mohawk's initial Petition.[3] Having already devoted substantial resources to this case only to dismiss the initial grant of certiorari as improvident, the Court should decline to review the case a second time.

I. The Court Need Not Grant Certiorari To Review Last Term's Decision in *Anza v. Ideal Steel Supply Corporation.*

First, Mohawk argues that the Court should grant certiorari to address the Eleventh Circuit's application of *Anza v. Ideal Steel Supply Corp.*, 126 S. Ct. 1991 (2006). Rather than admit that it seeks this Court's review to

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[1] *Compare* Petition for a Writ of Certiorari at 18-23 (No. 05-465) (hereinafter "2005 Pet.") (plaintifffs failed to plead a direct and proximate injury to business or property) *with* Petition for a Writ of Certiorari at 10-16 (No. 06-873) (hereinafter "Petition" or "Pet.") (same argument under *Anza*).

[2] *Compare* 2005 Pet. at 10-18 (seeking certiorari to review whether corporations and their agents may form an association in fact enterprise) *and* Br. of Pet. at 12-26, *Mohawk Indus., Inc. v. Williams*, 126 S. Ct. 2016, 2006 WL 282167 (2006) (No. 05-465) (arguing that corporations cannot be members of association-in-fact enterprises) *with* Pet. at 16-24 (reciting the same two arguments).

[3] *Compare* 2005 Petition at 19-21 (arguing that wage depression cannot qualify as an injury to business or property) *with* Pet. at 24-28 (same argument).

correct the alleged misapplication of a properly stated rule of law, Mohawk contends that *Williams II* both (1) ignores *Anza* and (2) creates an immediate circuit split over the very same decision. Of course, these contentions cannot both be true; and in fact, Mohawk is wrong on both counts.

A. The Eleventh Circuit Faithfully and Correctly Applied *Anza*.

The Petition contends the Eleventh Circuit thumbed its nose at this Court's direction to further consider *Williams v. Mohawk Industries, Inc.*, 411 F.3d 1252 (11th Cir. 2005) ("*Williams I*") in light of *Anza*.[4] Even though *Williams II* cites *Anza* more than ten times,[5] Mohawk contends the court of appeals "ignored" *Anza*'s central holding "that RICO civil plaintiffs must plead an injury directly caused by the RICO predicate acts and not by another 'set of actions . . . entirely distinct from the alleged RICO violation.'"[6] Mohawk further claims that the Eleventh Circuit ignored *Anza*'s holding that the "central question" in evaluating a RICO plaintiff's allegations of injury is "whether the alleged RICO violation led directly to the plaintiff's injuries."[7] But *Williams II* acknowledges and applies those very holdings. Indeed, the Eleventh Circuit began its proximate cause discussion by quoting *Anza*'s "central question" for analyzing causation in a civil RICO case and then underscored *Anza*'s emphasis that there "must be 'some direct relation' between the injury alleged and the

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[4] *See, e.g.*, Pet. at 16 (Eleventh Circuit "fail[ed] to heed *Anza* in the wake of this Court's explicit instruction to do so").

[5] *See Williams II*, Pet. App. at 14a-21a.

[6] Pet. at 3.

[7] *Id.* at 12.

injurious conduct in order to show proximate cause."[8] The court of appeals then went on to examine the list of additional "motivating principle[s]" precisely as *Anza* instructs.[9]

As the losing party below, Mohawk obviously takes great issue with the Eleventh Circuit's conclusion in this case. But given the court of appeals' extensive and accurate quotation of *Anza*, there can be no genuine controversy over whether *Williams II* properly states the rule of law announced in *Anza*. Accordingly, even if Mohawk were correct (which it is not) and the Eleventh Circuit had committed some technical error in applying *Anza* (which it did not), certiorari is unwarranted because this Court "is not primarily concerned with the correction of errors in lower court decisions."[10] To the contrary, Supreme Court Rule 10 expressly provides that the writ will not be granted to review the purported misapplication of a properly stated rule of law. And in *Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974), the Court explained that its discretionary review "depends on numerous factors ***other than*** the perceived correctness of the judgment we are asked to review." (emphasis added)

In any event, Mohawk's criticisms of the Eleventh Circuit's application of *Anza* miss the mark. *Anza* held that the defendant's fraud on the State of New York tax

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[8] *Williams II*, Pet. App. at 14a-15a.

[9] *Id.* at 15a-16a. Mohawk's suggestion that *Williams II* defies *Anza* by referring to the Respondents' allegation that Mohawk intended to injure them refers to the Eleventh Circuit's standing analysis, not its proximate cause analysis under *Anza*. *See* Pet. at 14.

[10] Robert L. Stern & Eugene Grossman, *Supreme Court Practice* § 4.17 at 256 (8th ed. 2002).

authority did not cause a third party any injury cognizable under RICO.[11] As the Court observed, the State – not the defendant's competitor – was the direct victim of this misconduct.[12] As a result, the *Anza* Court held the plaintiff could not recover damages for lost sales due to the defendant's decision to lower the prices it charged its customers.[13]

As *Williams II* explains, the claims here are very different because the plaintiffs do not seek to recover damages for fraud (or any other misconduct) directed at other parties.[14] Rather, the plaintiffs allege they are the direct victims of Mohawk's illegal hiring and other racketeering activity, which directly and unlawfully expands the pool of labor available to Mohawk and depresses the wages Mohawk pays all its employees.[15] Protecting the wages and working conditions of legal workers has been the primary motivating factor behind the nation's immigration laws for at least a century.[16] And this Court's precedents repeatedly

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[11] *See Anza*, 126 S. Ct. at 1997.

[12] *Id.*

[13] *Id.*

[14] *Williams II*, Pet. App. at 16a-21a.

[15] *See, e.g.*, Compl. ¶ 33-38, Pet. App. at 91a-93a.

[16] *See* H.R. Rep. No. 1365, 82d Congress, 2d Sess. at 10, 1952 U.S.C.C.A.N. 1653, 1662 (1952). *See also* S. Rep. No. 44-689, at IV-V (1877) (noting Congressional conclusion that competition from foreign workers depressed wages to "ruinously low rates"); House Comm. on the Judiciary, 100th Cong., *Grounds for Exclusion of Aliens Under the Immigration and Nationality Act: Historical Background and Analysis* at 8 (Comm. Print 1988) (same); H.R. Rep. No. 98-115, pt. 1 at 95-96 (1983) ("Illegal immigration ... depresses the wages and working conditions of low-skilled workers in this country, and reduces their employment opportunities"); S. Rep. No. 99-132 at 16 (1985) ("we seek to eliminate the illegal subclass now present in our society. ... Their

(Continued on following page)

recognize the innate, direct connection between hiring undocumented aliens and depressed wages for American workers.[17]

To better fit *Anza*'s mold, the Petition mischaracterizes the Complaint to allege an injury passed on from one category of employees to another.[18] This distortion – which must be rejected on a motion to dismiss – actually underscores that the plaintiffs are the only direct victims of the criminal conduct alleged. In *Anza* and its predecessor, *Holmes v. SIPC*, 503 U.S. 258 (1992), the Court held that the injuries alleged were not direct because there was a "more immediate victim" to vindicate the statute's purposes.[19] Because the plaintiffs are the direct victims of Mohawk's racketeering activity, *Anza* does not require dismissal. The only other court to consider *Anza* in the

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illegal status and resulting weak bargaining position cause [undocumented workers] to depress U.S. wages and working conditions"). Indeed, it is for this reason that the Department of Labor must certify that hiring certain foreign workers will not have "an adverse effect" on the wages, terms and benefits of U.S. workers. 20 C.F.R. § 656.24(b)(3).

[17] *See DeCanas v. Bica*, 424 U.S. 351, 356-57 (1976) ("acceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens"); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 893 (1984); *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002).

[18] *See* Pet. at 12-13 (arguing that the plaintiffs' injuries are derivative of conduct that Mohawk directs at other parties).

[19] *See Anza*, 126 S. Ct. at 1998 ("[t]he requirement of a direct causal connection is especially warranted where the immediate victims of an alleged RICO violation can be expected to vindicate their laws by pursuing their own claims."); *Holmes*, 503 U.S. at 273. *See also Associated General Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 541 (1983) (identifying alternative plaintiffs with more direct claims). *Compare* Pet. at 15 n.10 (arguing that the lack of any direct victim is irrelevant under *Anza*).

context of similar illegal hiring allegations reached the very same conclusion.[20]

Although Mohawk argues that *Williams II* defies this Court's June 5, 2006 GVR order, the Court did not direct the Eleventh Circuit to dismiss the Complaint. The Court has explained that a GVR is appropriate when it is "not certain that the case [is] free from all obstacles to reversal on [the] intervening precedent."[21] Such an order merely indicates that the Court believes the intervening precedent is "sufficiently analogous and, perhaps, decisive to compel reexamination of the case."[22] As a result, the Court's GVR is not the functional equivalent of a summary reversal, as the Petition argues. The Eleventh Circuit complied with this Court's direction and its application of *Anza* provides no basis for a second grant of certiorari.

B. There is No Circuit Split Over *Anza*.

Nor did *Williams II* create an immediate circuit split over the proper application of *Anza*. Only two courts have considered *Anza*'s impact on the proximate cause theory alleged here, and both concluded that allegations of hiring large numbers of undocumented workers are not "entirely

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[20] *See Trollinger v. Tyson Foods, Inc.*, No. 4:02-CV-23, 2006 WL 2868980 (E.D. Tenn. Sept. 29, 2006) (declining to certify an interlocutory appeal after denying the defendants' motion for judgment on the pleadings based on *Anza*). *Accord Trollinger v. Tyson Foods, Inc.*, 370 F.3d 602, 619 (6th Cir. 2004) (pre-*Anza* case upholding the same allegations of proximate cause); *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163, 1172 (9th Cir. 2002) (same).

[21] *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 222-23 (1995).

[22] *United States v. Vanorden*, 414 F.3d 1321, 1327 n.4 (11th Cir. 2005) (*citing Henry v. City of Rock Hill*, 376 U.S. 776, 776-77 (1964)).

distinct from" the injury of depressed wages for legal workers.[23] As a result, there is no split of authority for this Court to review.

The only conflict between *Williams II* and the Seventh Circuit's decision in *James Cape & Sons Co. v. PCC Construction Co.*, 453 F.3d 396 (7th Cir. 2006) is the difference between the facts and claims alleged in the respective complaints. In *James Cape*, the plaintiff sought to recover RICO damages for lost profits on bids it allegedly failed to win as a result of a bid-rigging scheme that targeted a third party, the Wisconsin Department of Transportation.[24] That scheme directly injured the Department, which had to make inflated payments to the winning contractors. Following *Anza*, the Seventh Circuit held that this more immediate victim "was fully capable of pursuing appropriate remedies much like the State of New York."[25] Rather than a circuit split, therefore, Mohawk has merely identified two different sets of facts for which *Anza* compels two different results. Even if Mohawk (incorrectly) contends *James Cape* illustrates some problem with the Eleventh Circuit's analysis of this Complaint, that type of fact-specific inquiry into the application of a precedent that is less than a year old is not the type of issue that typically concerns this Court.[26]

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[23] *See Williams II*, Pet. App. at 14a-21a; *Trollinger v. Tyson Foods, Inc.*, No. 4:02-CV-23, 2006 WL 2868980, at *3-4 (E.D. Tenn. Sept. 29, 2006) (declining to certify an interlocutory appeal after denying the defendants' motion for judgment on the pleadings based on *Anza*).

[24] *James Cape & Sons*, 453 F.3d at 404.

[25] *Id.*

[26] *See, e.g., United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific

(Continued on following page)

II. The Court Has Already Concluded It Would Be a Mistake to Review the Enterprise Questions Presented in Mohawk's Petition.

Last Term, the Court afforded Mohawk full briefing and oral argument on all the enterprise issues collected under the second Question Presented in Mohawk's Petition. But rather than reach the merits of those questions, the Court dismissed the writ as improvidently granted.[27] That ruling came after the Court discovered Mohawk had expressly waived its primary merits argument in the lower courts. Because this second Petition seeks to revive the same arguments the Court discarded last Term, certiorari is even less appropriate now.

Mohawk first introduced the argument that a corporation cannot be a member of an association-in-fact RICO enterprise pursuant to 18 U.S.C. § 1961(4) in its merits brief in this Court last Term. For two years before that filing, Mohawk had argued that corporations *could be* members of such enterprises. In 2004, Mohawk told the district court that: "Specifically, ***Mohawk agrees*** that ***a corporation can be both a RICO person and part of***

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facts."); *McCray v. New York*, 461 U.S. 961, 963 (1983) (denying certiorari because the question required further study in the lower courts); *Gilliard v. Mississippi*, 464 U.S. 867, 869 (1983) (indicating that certiorari was denied because a majority believed Supreme Court review should be deferred until "more state supreme courts and federal circuits have experimented" with the problem) (Marshall, J., dissenting). *See also* John Paul Stevens, *Some Thoughts on Judicial Restraint*, 66 Judicature 177, 183 (1982) ("The doctrine of judicial restraint teaches us that patience in the judicial resolution of conflicts may sometimes produce the most desirable result.").

[27] *Mohawk*, 126 S. Ct. at 2016.

an association-in-fact enterprise[.]"[28] And Mohawk subsequently informed the Eleventh Circuit that its arguments were perfectly consistent with RICO liability for corporations that participated in the affairs of an association-in-fact enterprise:

> Indeed, ***nothing in Mohawk's rule would affect the RICO liability of a corporation that truly participates in some larger association of corporations or (non-agent) individuals*** by engaging in racketeering activities on the enterprise's behalf.[29]

Based on these concessions and Mohawk's failure to preserve the antecedent question of whether a corporation can form an association-in-fact enterprise, the Court questioned whether it properly could reach any of Mohawk's enterprise arguments at last Term's oral argument.[30] In response, Mohawk's counsel conceded Mohawk's failure to preserve the issue and urged the Court to overlook that defect in its appeal.[31] But after devoting substantial time to hearing the case, the Court declined to reach the merits of Mohawk's enterprise arguments in this case.

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[28] *See* Mohawk Dist. Ct. Reply Br. at 5 (emphasis added) [Dist. Ct. Dkt. No. 43].

[29] Mohawk's 11th Cir. Reply Brief at 11 n.8 (filed Nov. 5, 2004) (emphasis added). *See also* Mohawk's 11th Cir. Br. at 12-13 (filed Sept. 7, 2004) ("This [plaintiff's theory] would be a substantial departure from ***current law, which requires that to sufficiently allege a RICO enterprise, a plaintiff must allege that the enterprise is comprised of a corporation*** and a separate, independent third party.") (emphasis added).

[30] *See* Tr. Oral Arg. at 5-10 (No. 05-465) (Apr. 26, 2006).

[31] *Id.* at 10 (suggesting that Mohawk waived the argument because "current law in the Eleventh Circuit law" rendered it "utterly futile").

This history is relevant here only because Mohawk cannot correct the procedural defects that led the Court to dismiss the writ on the very same enterprise questions that Mohawk recycles in the present Petition. Mohawk is still bound by the affirmative concessions it made in the lower courts.[32] And this Court still does not consider arguments that a petitioner failed to preserve for appeal.[33] In two very recent Opinions, the Court has reaffirmed that it will not consider arguments the Petitioner has already conceded and will not rule in the first instance on claims the lower courts did not consider.[34]

As discussed below, the Petition does not identify any enterprise issue worthy of this Court's attention. But given the Court's aversion to deciding questions not properly

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[32] Mohawk's attempt to resurrect its enterprise arguments by seeking an en banc review of the Eleventh Circuit precedents that led Mohawk to concede a corporation can be a member of an association-in-fact enterprise, *see* Pet. App. at 81a-83a, is too little too late. Neither Mohawk's en banc petition to the court of appeals nor its second Petition to this Court makes any attempt to explain why Mohawk should be permitted an about-face to argue the opposite of a position it advocated for two years in the district court and the court of appeals.

[33] *See, e.g., NOW v. Scheidler*, 510 U.S. 249, 262 (1994) (refusing to consider a constitutional challenge to RICO that the defendant failed to raise below); *Am. Nat'l Bank & Trust Co. v. Haroco, Inc.*, 473 U.S. 606, 608 (1985) (refusing to consider unpreserved argument that the complaint failed to allege a violation of 18 U.S.C. § 1962(c)).

[34] *Gonzales v. Duenas-Alvarez*, 127 S. Ct. ___, 2007 WL 98723, at *8 (Jan. 17, 2007) ("Regardless, the lower court did not consider the claims and we decline to reach them in the first instance") (collecting authorities); *Norfolk Southern Ry. Co. v. Sorrells*, 127 S. Ct. ___, 2007 WL 57176 (Jan. 10, 2007) (rejecting a petitioner's attempt to "smuggle" an antecedent question into the merits briefing despite having conceded the question in the lower courts).

developed below, the Court should deny certiorari in this case even if it did.

A. The Circuit Courts Have Unanimously Confirmed That Corporations Can Be Members of Association-in-Fact Enterprises.

On the merits, Mohawk urges the Court to grant certiorari and hold that corporations cannot be members of association-in-fact enterprises as a matter of law.[35] At oral argument last Term and again in the Petition, Mohawk concedes that the circuit courts have unanimously rejected this argument.[36] The courts agree on this point, in spite of Mohawk's arguments about isolated snippets of the statute, because § 1961's broader structure, as well as the drafters' careful use of "includes" rather than "means" in some but not all the definitions, demonstrates that § 1961(4) is drawn to be as broadly inclusive as possible. Reading the statute in context, the circuit courts universally have held that Mohawk's argument contradicts the plain language, leads to absurd results and "makes nonsense of the statute."[37] And although Mohawk claims that all the

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[35] *See* Pet. at 20-24.

[36] *See* Tr. Oral Arg. at 5-6 (No. 05-465) (Apr. 26, 2006) (Justice Scalia observing that 10 federal circuits have concluded corporations can be members of association-in-fact enterprises and that the Court would have been unlikely to grant certiorari to review that question standing alone); *Id.* (Mohawk's counsel acknowledging the lack of any split of authority and the unlikelihood of Supreme Court review). Pet. at 20-22 (acknowledging that the federal courts have universally rejected Mohawk's antecedent enterprise argument).

[37] *United States v. Huber*, 603 F.2d 387, 394 (2d Cir. 1979). *See also United States v. Masters*, 924 F.2d 1362, 1366 (7th Cir. 1991); *United States v. London*, 66 F.3d 1227, 1243-44 (1st Cir. 1995) (*citing* extensive authority); *United States v. Console*, 13 F.3d 641, 652 (3d Cir. 1993);

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circuit courts have made a grave error that perniciously extends RICO's reach into "ordinary commercial activity,"[38] Congress has never amended the statute to immunize corporations in the manner Mohawk proposes. Moreover, in its amicus brief to the Court last Term, the United States opposed Mohawk's construction of the statute and argued that it would "significantly impair the government's ability to enforce the statute's substantive provisions and to obtain effective remedies."[39] The Court should not grant certiorari to reconsider a statutory construction that has been well-settled for decades only to make nonsense of the statute and render RICO useless to government prosecutors as well as civil plaintiffs.

B. *Cedric Kushner* Resolved Any Division of Authority Over Whether a Corporation and its Legally Distinct Agents Can Form a RICO Enterprise.

Alternatively, Mohawk urges the Court to resolve a "deep[ening]" and "wid[ening]" circuit split over whether a corporation and its legally distinct, non-employee agents can form an association-in-fact enterprise.[40] But the Court effectively answered that question in *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158 (2001), holding that 18 U.S.C. § 1962(c) requires nothing more than legal

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United States v. Blinder, 10 F.3d 1468, 1473 (9th Cir. 1993); *Atlas Pile Driving Co. v. DiCon Fin. Co.*, 886 F.2d 986, 995 n.7 (8th Cir. 1989); *United States v. Perholtz*, 842 F.2d 343, 352-53 (D.C. Cir. 1988); *United States v. Thevis*, 665 F.2d 616, 625 (5th Cir. 1988).

[38] Pet. at 22.

[39] Br. for the United States as *Amicus Curiae* at 16 (05-465).

[40] Pet. at 16-18.

distinctness between the defendant and the RICO enterprise. In *Cedric Kushner*, the complaint named a corporation as the enterprise and the corporation's president as the defendant. Because the defendant was also the corporation's sole owner and employee, he sought to dismiss on the theory that there was no distinction between him and the alleged enterprise. After acknowledging that the statute "suggests" the enterprise cannot be "simply the same 'person' [or defendant] referred to by a different name," the Court went on to hold that even a formal distinction satisfied this requirement:

> The corporate owner/employee, a natural person, is distinct from the corporation itself, a legally different entity with different rights and responsibilities due to its different legal status. ***And we can find nothing in the statute that requires more "separateness" than that.***[41]

Even though the owner/employee was clearly a corporate agent, alleged to be acting in furtherance of the corporation's interests, this Court held that the defendant and his corporation were separate enough to satisfy § 1962(c)'s implied distinctness requirement.[42]

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[41] *Cedric Kushner*, 533 U.S. at 163 (emphasis added).

[42] In *Cedric Kushner*, the corporation was the enterprise, not a member of a larger association in fact. But including the RICO person in a broader association in fact enterprise is entirely consistent with *Kushner's* distinctness analysis because "[a] collective entity is something more than the members of which it is comprised." *Atlas Pile Driving*, 886 F.2d at 995 (concluding that a corporation can be the RICO defendant as well as a member of a larger association in fact enterprise). *See also United States v. Goldin Indus.*, 219 F.3d 1271, 1276 (11th Cir. 2000) ("To find that a defendant cannot be *part* of the enterprise would undermine the purposes of the RICO statute");

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Mohawk argues that there is a split between the circuits that have (1) adopted a "distinct entities" test in accordance with *Cedric Kushner* and (2) rejected an enterprise comprised of a corporation plus its employees, subsidiaries or agents on the grounds that such an entity "is in reality no more than the defendant itself."[43] With only two exceptions, the cases Mohawk cites to support the second half of this purported split pre-date *Cedric Kushner*. And without exception, those rulings rely on theories the *Cedric Kushner* Court unanimously rejected.[44] For example, *Cedric Kushner* specifically disavowed the argument that the RICO statute requires additional distinctness because a corporation can only act through its employees.[45] The Court similarly held that *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), a Sherman Act case holding that a corporation cannot conspire with a wholly-owned subsidiary, has no application to RICO.[46] Accordingly, while the Court's opinion noted and distinguished many of the cases that Mohawk now

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London, 66 F.3d at 1243; *United States v. Feldman*, 853 F.2d 648, 658 (9th Cir. 1988); *Cullen v. Margiotta*, 811 F.2d 698, 729-30 (2d Cir. 1987).

[43] *See* Pet. at 18.

[44] *See* Resp. Br. at 44-50 (05-465).

[45] *Compare Kushner*, 533 U.S. at 166-67 *with Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3d 339, 344 (2d Cir. 1994) ("Because a corporation can only function through its employees and agents, any act of the corporation can be viewed as an act of such an enterprise.").

[46] *Compare Cedric Kushner*, 533 U.S. at 166 (*Copperweld* "doctrine turns on specific antitrust objectives") *with Fitzgerald v. Chrysler Corp.*, 116 F.3d 225, 228 (7th Cir. 1998) (*citing Copperweld* for proposition that Chrysler and its wholly-owned distributors could not be held liable under RICO).

recites in its petition, *Cedric Kushner*'s analysis dismantles the analytical underpinnings of those cases.[47]

Baker v. IBP, Inc., 357 F.3d 685 (7th Cir. 2004) and *Bucklew v. Hawkins, Ash, Baptie & Co.*, 329 F.3d 923 (7th Cir. 2003) are the only post-*Cedric Kushner* cases Mohawk can cite for any lingering doubt about the consequences of *Cedric Kushner*'s unanimous conclusion that legally distinct entities are separate enough to serve as the defendant and enterprise in a RICO case. Because both *Bucklew* and *Baker* fail to acknowledge *Cedric Kushner* and instead apply *Copperweld* despite *Cedric Kushner*'s contrary admonition, those cases are wrongly decided.[48] And although this Court granted certiorari based on Mohawk's *Baker* arguments last Term, Mohawk made no effort to defend *Baker* in its merits briefs. After closely reviewing the merits of this question last Term, the Court dismissed certiorari as improvidently granted.

The Petition urges the Court to revisit the question in this case because Mohawk contends the Ninth Circuit's decision to follow *Cedric Kushner* in *Living Designs, Inc. v. E.I. Dupont de Nemours & Co.*, 431 F.3d 353, 361 (9th Cir. 2005), further extends the circuit split.[49] But Mohawk cited

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[47] While the United States took no position on this particular point, the government did oppose Mohawk on the merits and argued that Mohawk's reference to the *Riverwoods* line of cases was a "non sequitur" in this case. *See* U.S. Amicus Br. at 27-30 (No. 05-465).

[48] *See Bucklew*, 329 F.3d at 934 (*citing Copperweld* for the proposition that "A parent and its wholly owned subsidiaries no more have sufficient distinctness to trigger RICO liability than to trigger liability for conspiring in violation of the Sherman Act"); *Baker*, 357 F.3d at 691 (*citing Bucklew*).

[49] *See* Pet. at 18.

Living Designs, to this Court in its merits brief last Term,[50] months before the Court decided to forego the enterprise issues presented in this case. The Court also declined to reach any of the enterprise issues presented in *Living Designs*, by denying the writ in that case one week after dismissing certiorari here.[51] Accordingly, there has been no material change in the circuit courts with respect to the enterprise question the Court dismissed in June 2006. And Mohawk can offer the Court no reason to reinstate certiorari to take up the very same question it declined to reach – in either this case or *Living Designs* – last Term.

III. The Petition's "Business or Property" Questions Are Not Presented in this Case.

In its third Question Presented, Mohawk urges the Court to grant certiorari to address two separate issues concerning the meaning of "business or property" under 18 U.S.C. § 1964(c). The short answer is that neither of these issues has anything to do with this case.

First, Mohawk argues that the Court should grant certiorari to resolve a purported circuit split over whether depressed wages can qualify as an injury to business or property. Mohawk concedes that several circuits have concluded that plaintiffs can bring RICO suits to recover lost wages, but claims the Seventh Circuit created a circuit split on this question with its decision in *Evans v. City of Chicago*, 434 F.3d 916, 925 (7th Cir. 2006).[52] What the

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[50] *See* Br. of Pet. at 31, 35 (Feb. 2, 2005) (No. 05-465).

[51] *See E.I. Dupont de Nemours & Co. v. Living Designs, Inc.*, 126 S. Ct. 2861 (June 12, 2006).

[52] *See* Pet. at 24-25.

Petition does not confess, is that *Evans* expressly distinguishes the depressed wage claims made in this very case.

In *Evans*, the plaintiff sought to recover damages for income lost because he could not work during a period of alleged false imprisonment. Like every circuit to consider the issue, the Seventh Circuit held that the "inability to pursue or obtain meaningful employment" is a "personal injury" that cannot be recovered under RICO.[53] The same limitation applies to private antitrust suits seeking damages for injuries to "business or property" under Section 4 of the Clayton Act, on which 18 U.S.C. § 1964(c) is modeled.[54] *Evans* cites and follows these authorities, including precedents from both the Seventh Circuit and Eleventh Circuits. Accordingly, there is no dispute in these or any other circuit courts about the proposition of law applied in *Evans*.[55]

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[53] *Evans*, 434 F.3d at 926 (collecting cases); *Doe v. Roe*, 958 F.2d 763, 767 (7th Cir. 1992) ("Not surprisingly, all other courts construing this language have likewise concluded that a civil RICO action cannot be premised solely upon personal or emotional injuries") (collecting authorities) *see also*, David B. Smith and Terrance G. Reed, *Civil RICO*, 10.04[1] (Compensable Injuries) (2006) ("One proposition about RICO damages which appears to have widespread support is that the business or property limitation in section 1964(c) does not permit recovery for personal injuries. This limitation applies to private antitrust suits under section 4 of the Clayton Act and courts have similarly construed section 1964(c) in reliance on this interpretation of section 4") (internal quotations omitted).

[54] *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 339-40 (1979).

[55] To be sure, *Evans* noted a disagreement with *Diaz v. Gates*, 470 F.3d 897 (9th Cir. 2005) (*en banc*), *cert. denied*, 126 S. Ct. 1069 (2006), but that concerned (1) whether income lost to false imprisonment was a personal injury and (2) conflicting property rights under state law. *See Evans*, 434 F.3d at 931 n.26. Those disagreements are not implicated

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As *Evans* recognized, however, not every claim for lost wages is a claim for personal injury and, in the proper circumstances, a plaintiff may "recover under RICO for loss of an employment opportunity."[56] To illustrate the distinction between personal injuries and damages that qualify as injuries to business or property, the *Evans* court cited the Eleventh Circuit's analysis in this case:

> Where an employee is able to establish that he has been unlawfully deprived of a property right in promised for or contracted for wages, the courts have been amenable to classifying the loss of those wages as injury to "business or property." *See e.g., Williams v. Mohawk Industries, Inc.*, 411 F.3d 1252, 1260 (11th Cir. 2005).[57]

Given the *Evans* court's apparent agreement with the Eleventh Circuit's analysis in *Williams I*, which is repeated verbatim in *Williams II*, there is no circuit split for the Court to resolve here.

Mohawk also urges the Court to grant certiorari to address an opaque dispute over whether "property" may derive from federal or state law – or both. Section 1964(c) is presumably broad enough to protect property interests defined by any source of authority, including federal and state law.[58] But whatever the merits or consequences of

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here because the Respondents do not allege false imprisonment or personal injury.

[56] *Evans*, 434 F.3d at 928.

[57] *Id.*

[58] Even in the takings jurisprudence that Mohawk improperly seeks to import here, this Court has held that "property" under the Fourteenth Amendment can be defined by any source, including state law. *See Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

this debate, it was neither considered nor resolved in *Williams II*. In fact, the Eleventh Circuit specifically declined to rule on whether depressed wages constitutes an injury to property under § 1964(c):

> We need not reach whether plaintiffs have a property interest because plaintiffs clearly have alleged a business interest affected by Mohawk's alleged RICO violations.[59]

This ruling renders any debate over the potential sources of property interests academic in this case. The Court, therefore, should not grant certiorari on the Petition's third Question Presented.

IV. The Court Should Decline to Review this Interlocutory Order.

Finally, the Court should deny Mohawk's second Petition because the issues at stake here will be greatly shaped and illuminated by the evidence. With respect to both the enterprise and proximate cause issues that Mohawk advances, the Eleventh Circuit held that the Respondents had plainly alleged enough to proceed, but emphasized that they would have to prove their case to prevail.[60] Ultimately, the question of whether Mohawk's

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[59] Pet. App. at 12a. The Petition misrepresents the Complaint by suggesting the Respondents alleged only an injury to property. *See* Pet. at 24. In fact, the Complaint alleges the Respondents and the class have suffered an injury to both business and property. Pet. App. at 103a (Compl. ¶ 86).

[60] *See Williams II*, Pet. App. at 9a ("Whatever difficulties the plaintiffs may have in proving such an allegation, they have sufficiently alleged that Mohawk is engaged in the operation or management of the enterprise."); *id.* at 21a ("Although the plaintiffs' evidence in this case may not ultimately prove the proximate-cause requirement, we

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racketeering activity depresses wages for its legal employees is a question of fact that can only be resolved with data, factual analysis and expert testimony. These issues, therefore, are not well-suited to decision as a matter of law on a motion to dismiss. And even if Mohawk could convince the Court that the Complaint was deficient in some respect, the plaintiffs would be entitled to seek leave to amend their allegations, which "should be freely given when justice so requires."[61]

For these and other similar reasons, this Court traditionally has preferred to grant the writ to review final rather than interlocutory orders.[62] Because the review of a non-final order induces inconvenience, litigation costs and delay in reaching ultimate justice, lack of finality may "of itself alone" furnish "sufficient ground for the denial of the application."[63] More than a century ago, the Court advised that it would not "issue a writ of certiorari to review a decree of the circuit court of appeals on an appeal from an interlocutory order unless it is ***necessary to prevent extraordinary inconvenience and embarrassment*** in the conduct of the cause."[64] Allowing this case to proceed to

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conclude that the plaintiffs' complaint states a sufficiently direct relation between their alleged injury and Mohawk's alleged unlawful predicate acts to withstand Mohawk's motion to dismiss.").

[61] Fed. R. Civ. P. 15(a).

[62] *Estelle v. Gamble*, 429 U.S. 97, 115 (1976) (the Court's "normal practice is to deny[ ] interlocutory review") (Stevens, J., dissenting).

[63] *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). *See also Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152-53 (1964).

[64] *Am. Constr. Co. v. Jacksonville, T. & K.W. Ry. Co.*, 148 U.S. 372, 384 (1893) (emphasis added). *See also Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950).

class and merits discovery – more than three years after the case was filed – hardly meets that standard.

CONCLUSION

For the foregoing reasons, the Court should deny Mohawk's second Petition for certiorari in this interlocutory appeal.

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No. 06-873

FILED
FEB 19 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The Supreme Court of the United States

MOHAWK INDUSTRIES, INC.,

Petitioner,

v.

SHIRLEY WILLIAMS, GALE PELFREY, BONNIE JONES, and LORA SISSON, Individually and on behalf of a class,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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INTRODUCTION

Pursuant to Supreme Court Rule 15.8, the respondents submit this Supplemental Brief to correct several representations about the proceedings below that appear in the February 6, 2006 Reply Brief of Petitioner. Those proceedings are significant here because the Court considered the merits of Mohawk Industries Inc.'s RICO enterprise arguments last Term, only to dismiss certiorari as improvidently granted after learning that Mohawk had failed to preserve the "antecedent question" of whether a corporation can ever be a member of an association-in-fact enterprise pursuant to 18 U.S.C. § 1961(4). In its Reply, Mohawk parses the words of its lower court briefs, attempts to distinguish between "the issues" and "its arguments," and contends there is no waiver. It is for this Court to determine how Mohawk's repeated prior concessions that a corporation can be a member of an association-in-fact enterprise will affect this Petition. But the Court should make that determination based on a clear sense of what actually transpired below. And because Supreme Court Rule 15.2 requires respondents to point out any objections to "considering a question presented based on what occurred in the proceedings below," the plaintiffs submit this Supplemental Brief to clarify those proceedings in this case.

SUPPLEMENTAL REASONS FOR DENYING THE PETITION

Mohawk's second Question Presented asks the Court to grant certiorari to resolve an alleged circuit split over whether a corporation and its agents are sufficiently distinct to form a RICO enterprise. Mohawk further urges

the Court to address the "critical antecedent question" of whether a corporation may ever be a constituent part of an enterprise consisting of a "group of individuals associated in fact" pursuant to 18 U.S.C. § 1961(4).[1] But Mohawk waived that antecedent question when it informed both the district court and the Eleventh Circuit that Mohawk agreed corporations could form part of an association-in-fact enterprise.[2]

Although the Petition made no mention of this substantial obstacle to certiorari, Mohawk's Reply argues there is no waiver because Mohawk consistently has maintained that the plaintiffs failed to allege a proper RICO enterprise.[3] Even if Mohawk failed to make the argument for which it seeks certiorari, the Reply suggests that the arguments Mohawk did make nevertheless preserved any conceivable enterprise "issue."[4] Second, the Reply contends the entire inquiry is irrelevant because Mohawk did preserve the argument it now presses on appeal. Finally, the Reply argues that regardless of what Mohawk advocated to the lower courts, this Court should grant certiorari because the Eleventh Circuit "passed on" the question of whether corporations can be members of association-in-fact enterprises. As explained below, each of these arguments misstates the record.

1. The issue raised in Mohawk's motion to dismiss, on interlocutory appeal to the Eleventh Circuit and on

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[1] Reply Br. of Pet. at 5 (filed Feb. 6, 2007) ("Reply"); Pet. for a Writ of Certiorari at 20-21 (filed Dec. 19, 2006) ("Pet."). *See also* U.S. Chamber of Commerce *Amicus* Br. (filed Jan. 22, 2007).

[2] *See* Br. in Opp. to the Pet. at 9-12 (filed Jan. 22, 2007) ("Opp."); Resp. Br. at 12-14 (05-465, filed Mar. 16, 2006).

[3] *See* Reply at 5-9.

[4] *Id.* at 6.

certiorari to this Court last Term was whether the plaintiffs had alleged an enterprise distinct from Mohawk itself. In the lower courts, Mohawk offered two arguments to support that contention. First, Mohawk argued that the alleged enterprise of Mohawk plus third-party recruiters was no different than (or not separate from) Mohawk itself.[5] Mohawk also offered the related argument that its alleged participation in the affairs of this enterprise was no different than (or not separate from) conducting the affairs of Mohawk itself.[6] Mohawk's issue – and both its supporting arguments – therefore concerned the plaintiffs' purported failure to identify an enterprise separate from Mohawk. As this Court held in *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 160-63 (2001), those "separateness" concerns are suggested by 18 U.S.C. § 1962(c), which requires the plaintiff to plead and prove the defendant's participation in the affairs of a RICO enterprise. Mohawk's briefs to the district court and the court of appeals echo that point by making repeated reference to § 1962(c).

The very different question that Mohawk seeks to inject into the case now is whether RICO's separate definitional statute, 18 U.S.C. § 1961(4), permits the inclusion of corporations in any association-in-fact enterprise. Section 1961(4) provides that a RICO enterprise "includes . . . any union or any group of individuals associated in fact," and as the Petition concedes, all the circuit

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[5] *See* Mohawk Dist. Ct. Motion to Dismiss at 10-12 (Dist. Ct. Dkt. No. 25, filed Feb. 9, 2004).

[6] *Id.* at 12-14. To the extent Mohawk preserved any other arguments they related to the sufficiency of plaintiffs' description of the enterprise and an alleged lack of common purpose. *Id.* at 13-15 & n.7.

courts agree that this definition is broad enough to encompass associations comprised of corporations and other legal entities.[7] After affirmatively representing to the district court and the court of appeals that Mohawk agreed with that well-settled interpretation of § 1961(4), Mohawk seeks to reverse course, and its Petition urges this Court to be the first to take up the § 1961(4) question in this case.

Although Mohawk concedes that its Petition presents two enterprise questions, the Reply conflates those questions without acknowledging that there are two entirely different statutory provisions at issue. That difference is important because *American National Bank & Trust Co. v. Haroco, Inc.*, 473 U.S. 606 (1985), another RICO case, summarily rejected a similar attempt to pirouette from the RICO provision the petitioner had argued below to a different provision in the Supreme Court. In the court of appeals, the petitioner had argued that RICO's civil damage provision, 18 U.S.C. § 1964(c), required the plaintiff to plead an injury caused by the defendant's participation in the affairs of an enterprise, not just an injury caused by the predicate crimes. After winning certiorari to review this § 1964(c) question, the petitioner argued that the complaint did not properly allege the defendant's conduct of an enterprise's affairs in violation of § 1962. The Court noted that this separate question of statutory interpretation was not properly before the Court because the

[7] *See* Pet. at 20 (noting the "wide acceptance" of this interpretation of § 1961(4)).

petitioner had not made the argument below and the court of appeals had not passed on it.[8]

Mohawk's attempt to overhaul its prior § 1962(c) distinctness arguments to sweep up an entirely discrete § 1961(4) question is no different. And the cases Mohawk cites at pp. 6-7 of the Reply offer no support to the petitioner who seeks to reverse a defeat by raising an entirely new question about an entirely different statutory provision for the first time in this Court.[9] At bottom, Mohawk's contention that it preserved every conceivable enterprise argument by framing the "overarching issue of whether plaintiffs had plead a legally cognizable RICO enterprise"[10] is not much different than the untenable theory that a not guilty plea preserves all issues for Supreme Court review, regardless of the arguments the defendant chose to make to the lower courts.

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[8] *Id.* at 608. *See also Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 456-57 (1995) (declining to address an argument premised on a statute the petitioner had failed to raise in the lower courts).

[9] Indeed, *Yee v. City of Escondido*, 503 U.S. 519, 533 (1992), confirms that the Court will not consider a claim the petitioner failed to advance below. The argument the Court permitted had been raised (albeit ambiguously) and passed on below, but the Court excluded a substantive due process claim that was neither made nor ruled upon in the lower courts. *Id.* at 533-34. Moreover, in *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 678 n.27 (2001), the "reframe[d]" issue concerned coverage under the same statute and the Court noted that the importance of the question demanded an exception to the ordinary rule. *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) is inapposite because, although the petitioner had waived the argument, the court of appeals had nevertheless ruled directly on the question. As noted below, the Eleventh Circuit did not similarly pass on the § 1961(4) question Mohawk advances here.

[10] Reply at 6.

2. In addition, the Reply Brief contends that Mohawk preserved the antecedent question "because Mohawk did explicitly raise the foreclosed § 1961(4) argument both before the panel and the entire Eleventh Circuit."[11] Although literally true, that description badly misrepresents the record. To the extent Mohawk raised this issue in *Williams I*, it was to affirmatively represent that corporations ***could be*** members of association-in-fact enterprises – a position that directly contradicts the argument for which it now seeks certiorari.[12] After this Court dismissed certiorari as improvidently granted in *Williams I* and remanded the case to the court of appeals last Term, the Eleventh Circuit limited any supplemental briefing to the proximate causation issues raised by this Court's decision in *Anza v. Ideal Steel Supply Corp.*, 126 S. Ct. 1991 (2006).[13] Accordingly, Mohawk made a single, passing reference to the § 1961(4) argument in the last footnote on the last page of its Supplemental Brief. That fleeting footnote represents Mohawk's only substantive attempt to argue that § 1961(4) precludes (rather than permits) association-in-fact enterprises comprised of corporations before the

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[11] *Id.*

[12] *See* Mohawk Dist. Ct. Reply Br. at 5 [Dist. Ct. Dkt. 43] ("Mohawk agrees that a corporation can be both a RICO person and part of an association-in-fact enterprise"); Opp. at 9-10 (collecting additional concessions). Those representations waive the § 1964(1) argument for purposes of this appeal, without regard to any separate argument over judicial estoppel. *See Steagald v. United States*, 451 U.S. 204, 208-09 (1981) (government forfeited its opportunity to contest the defendant's reasonable expectation of privacy by failing to make the argument below and by acquiescing the point in its brief in opposition to certiorari).

[13] *See* Order (11th Cir. July 27, 2006).

Eleventh Circuit rendered *Williams II*, the decision for which the Petition seeks this Court's review.

Mohawk argues that nothing further could have been expected because binding precedent in the Eleventh Circuit – and every other circuit – foreclosed the argument that a corporation could not be a member of an association-in-fact enterprise.[14] The Reply cites *MedImmune, Inc. v. Genentech, Inc.*, 127 S. Ct. 764, 770 (2007), for the proposition that Mohawk's tactics constituted "counsel's sound assessment that the [§ 1961(4)] argument would be futile" in light of binding precedent.[15] But *MedImmune* declined to find waiver where the petitioner had devoted "a few pages of its appellate brief" to the foreclosed argument before seeking certiorari.[16] Moreover, in *MedImmune* there was no indication that the petitioner had represented its agreement with the proposition of law that it later asked this Court to reverse. Accordingly, Mohawk's efforts to present its § 1961(4) argument to the Eleventh Circuit panel that decided both *Williams I* and *Williams II* does not meet the *MedImmune* standard. Only after the panel issued *Williams II*, rejecting Mohawk's *Anza* arguments, did Mohawk devote any substantive attention to the enterprise argument it now presses this Court to review.[17]

3. Finally, the Reply contends that regardless of what Mohawk presented to the lower courts, this Court should grant review because the Eleventh Circuit "passed

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[14] *See* Reply at 5-6.

[15] *Id.* at 6 n.5.

[16] *MedImmune*, 127 S. Ct. at 770.

[17] *See* Pet. App. 81a-84a.

upon" the § 1961(4) argument in *Williams II*.[18] Once again, that misstates the record because on remand from this Court, the Eleventh Circuit specifically limited its consideration and the *Williams II* decision to *Anza's* impact on the plaintiffs' proximate cause allegations. Indeed, the *Williams II* panel declined to reconsider any enterprise issue and simply reissued its prior enterprise analysis verbatim from *Williams I*.[19] Moreover, the citation to *United States v. Goldin Industries, Inc.*, 219 F.3d 1271, 1275 (11th Cir. 2000) at Pet. 7a-8a, on which Mohawk bases its claim, makes no mention of the corporation question Mohawk urges on the Court.[20] The different proposition for which the court of appeals cited *Goldin* constitutes nothing more than a "routine restatement and application of settled law by an appellate court," which does not satisfy this Court's "pressed or passed upon below" rule.[21] Nor did the full Eleventh Circuit "pass upon" Mohawk's § 1961(4) argument when it denied Mohawk's petitions for re-hearing without comment or dissent.[22]

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[18] Reply at 6 n.5 (citing Pet. App. 7a-8a).

[19] *Compare* Pet. 7a-12a *with Williams I*, 411 F.3d 1251, 1257-60 (11th Cir. 2005).

[20] *See* Pet. 7a-8a (citing *Goldin* for the proposition that an enterprise must have an "ongoing organization," "function as a continuing unit," and exist as an "association of individual entities, however loose or informal, that furnishes a vehicle for the commission of two or more predicate crimes").

[21] *Illinois v. Gates*, 462 U.S. 213, 223 (1983) (without "any real contest" on the point, the routine application of prior precedent is not sufficient).

[22] *Cf. Yee*, 503 U.S. at 533 (denial of certiorari expresses no view on the merits and therefore does not satisfy the Court's requirement that a prior court pass upon the question); *City of Houston v. Hill*, 482 U.S. 451, 467 n.16 (1987) (abstention argument was significantly undercut because the petitioner had not raised it before the panel and the en banc court made no mention of the argument).

Mohawk's serial attempts to overcome the legal hurdles to reviewing the § 1961(4) question it conceded below are effectively answered by this Court's decision in *United States v. United Foods, Inc.*, 533 U.S. 405, 417 (2001). There, the Court acknowledged that it has occasionally permitted a litigant to defend a lower court judgment on grounds different than those advocated below, but held that "it is quite a different matter to allow a petitioner to assert new substantive arguments attacking, rather than defending, the judgment when those arguments were not pressed in the court whose opinion we are reviewing, or at least passed upon by it."[23] Because Mohawk's belated attempt to secure a dismissal based on § 1961(4) falls firmly into this latter category, the Court should decline Mohawk's invitation to review the question in this case.

CONCLUSION

The record below demonstrates that Mohawk's motion to dismiss attacked the plaintiffs' ability to satisfy 18 U.S.C. § 1962(c), not § 1961(4). In challenging the alleged enterprise, Mohawk did not press the separate § 1961(4) question that Mohawk now urges in the Petition. To the contrary, Mohawk affirmatively conceded that question by telling the lower courts that it agreed corporations could be part of an association-in-fact enterprise. As a result, neither the district court nor the court of appeals passed upon that question. Mohawk's varied attempts to avoid the consequences of its prior concessions cannot be reconciled

[23] 533 U.S. at 417.

with record in this case. Because this Court does not sit as a court of first instance and does not grant certiorari to review issues that the parties failed to press below, the Petition should be denied.

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Supreme Court, U.S.
FILED
FEB 6 2007
OFFICE OF THE CLERK

No. 06-873

IN THE

Supreme Court of the United States

MOHAWK INDUSTRIES, INC.,

Petitioner,

v.

SHIRLEY WILLIAMS, GALE PELFREY, BONNIE JONES, AND LORA SISSON, individually and on behalf of a class,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY BRIEF OF PETITIONER

As set forth in the petition, this case presents three significant questions about the proper scope of civil suits under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 ("RICO"). Plaintiffs attempt to avoid this Court's review by systematically misstating the record and the law. *First*, as to direct injury, plaintiffs claim the court of appeals complied with *Anza* in large part because that court "cited *Anza*." Opp. 3. Under any fair reading of the opinion below, it is clear that the panel was not faithful to *Anza*'s teachings. *Second*, as to the enterprise issue, plaintiffs mistakenly claim that a 4-3 circuit split has already been resolved by this Court. With that argument failing, plaintiffs also mischaracterize the record below and claim that Mohawk waived the antecedent argument regarding the statutory definition of enterprise. That view, however, is simply mistaken. Mohawk has consistently claimed that the enterprise allegations are legally insufficient and sought rehearing en banc from the court of appeals on the precise argument that prior binding circuit precedent had wrongly rejected. *Third*, plaintiffs unavailingly claim that the circuit split over whether an injury to wages provides civil RICO standing is not implicated by this case.

1. This Court's decision last Term in *Anza* v. *Ideal Steel Supply Corp.*, 126 S. Ct. 1991 (2006), held within it the promise to clarify substantially the proper scope of civil RICO litigation. Allegations of an injury that flowed *logically* from the alleged RICO violation were not enough. Instead, *Anza* requires that the action that directly caused plaintiff's injury had to be the RICO violation, and not some other action that resulted from the violation. See *id.* at 1997 ("The cause of [plaintiff's] asserted harm[] ... is a set of actions (offering lower prices) entirely distinct from the alleged RICO violation (defrauding the State)."). This Court explained that RICO's direct injury requirement "is meant to

prevent ... intricate, uncertain [damage] inquires from overrunning RICO litigation." *Id.* at 1998.

The court of appeals failed to apply *Anza* despite this Court's direction to reconsider this case. Indeed, plaintiffs' defense of the decision below is telling: According to plaintiffs, the court of appeals complied with this Court's order because it "cites *Anza*" and included "extensive and accurate quotation of *Anza*." Opp. 3, 4. But citing *Anza* while ignoring its holding is not complying with it. Even a cursory review of plaintiffs' claim reveals that it fails to state a claim for the same reasons the claim in *Anza* failed. Like the *Anza* plaintiff, plaintiffs allege an injury (depressed wages) resulting from their employer's decision to pay them a particular wage rate. That wage rate is not itself unlawful. Instead, plaintiffs allege that Mohawk selected it because its alleged RICO violations enabled it to do so (in the same way that the *Anza* defendant was alleged to have selected a price as a result of tax fraud).[1] That this alone is fatal to plaintiffs' claim is confirmed by the fact that Mohawk's wage rate is influenced by a complex multitude of factors. See Pet. 13-14. While Ph.D. labor economists regularly debate these myriad influences, this is precisely the type of debate that this Court held that jurors should not decide in an already complicated RICO case. See *Anza*, 126 S. Ct. at 1997.

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[1] Plaintiffs contend that their injury is direct because the purported motivation of federal immigration law is to protect jobs for legal workers. *See* Opp. 5. Even if that were the case, all intended beneficiaries of a law are not *directly* injured, as RICO requires. Legislative history often identifies victims who nonetheless are not *directly* injured victims for civil RICO purposes. For example, Congress has explained that criminal schemes to avoid sales tax on cigarettes harm "[t]he truly innocent victims": legitimate retailers driven out of business because of competition from untaxed cigarettes. S. Rep. No. 95-962, at 7-8 (1978), *available at* 1978 U.S.C.C.A.N. 5518, 5522. But *Anza* rejected suits by such "victims" because their injuries are indirect.

In failing to apply *Anza*'s holding, the court of appeals fashioned its own incompatible test: the injury is direct when there is a "correlation" with the RICO violation. Pet. App. 17a. A correlation requirement, however, is exactly the type of tenuous connection *Anza* rejects as insufficient: indeed, the failure to charge customers sales tax in *Anza* certainly correlated with the ability to win those customers from a competitor. As a result, the court of appeals has robbed *Anza* of its promise to rein in attenuated claims.

By contrast, the Seventh Circuit properly understood *Anza* and rejected a "correlated" injury. Plaintiffs deny that the Eleventh Circuit's decision creates a circuit split with the Seventh Circuit in *James Cape & Sons Co.* v. *PCC Constr. Co.*, 453 F.3d 396 (7th Cir. 2006). See Opp. 8. Plaintiffs are wrong. Each of the primary factors that the Eleventh Circuit relied upon to find a direct injury in this case was equally present in *James Cape*. Like respondents here, the *Cape* plaintiff pled an injury (losing competitive bids) that correlates with the alleged predicate act (a competitor's bid rigging). And like respondents, the *Cape* plaintiff pled that the purpose of the racketeering acts was to steal contracts from it.[2] Under the Eleventh Circuit's analysis, the correlation between lost contracts and bid-rigging, and the defendants' alleged purpose to take contracts from the plaintiff would be sufficient to plead a direct injury. See Pet. App. 16a-17a. But the Seventh Circuit rejected that holding, focusing instead on the central *Anza* inquiry: whether the plaintiff's claimed injury was the direct result of the claimed predicate acts. *James Cape*, 453 F.3d at 403. The stark division between the Seventh Circuit's straightforward

[2] *See* Compl. ¶ 1, *James Cape*, No. 05-C-269 (E.D. Wisc. filed Mar. 10, 2005) ("The defendants conspired to take work from James Cape for the defendants' benefit and to James Cape's detriment.").

application of *Anza* and the Eleventh Circuit's "correlation" test provides another reason to grant review.[3]

2. Last Term this Court recognized that the question of whether a RICO claim can be predicated upon an association-in-fact enterprise consisting of a corporation and its agents warranted review.[4] In an attempt to avoid review, plaintiffs no longer maintain that the split is not implicated—that effort failed in their prior brief in opposition. See Br. in Opp. at 2, No. 05-465 (U.S. filed Nov. 9, 2005). Instead, plaintiffs now take an equally unavailing tack, asserting that this Court "effectively answered" the question and resolved the split in *Cedric Kushner Promotions, Ltd.* v. *King*, 533 U.S. 158 (2001). Opp. 13-14.

Plaintiffs badly mischaracterize this Court's decision in *Cedric Kushner*. There, the Court only noted the enterprise question presented here—it did not purport to resolve it. *Cedric Kushner* involved a classic RICO situation where an individual controls and misuses a corporation. The issue in that case was whether the shareholder and employee of a corporation could be sued as a RICO defendant for conducting the affairs of the corporation as a RICO enterprise. This Court held that it could, finding that the individual defendant was distinct from the corporation he

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[3] Plaintiffs also suggest *James Cape* is distinguishable because the state agency awarding contracts "had to make inflated payments." Opp. 8. *James Cape*, however, involved undercutting by *lower* bids. As a result, the state agency was not a more immediate victim—it saved money.

[4] Plaintiffs assert that this Court's June 5, 2006 order vacating *Williams I* and ordering the Eleventh Circuit to reconsider this case in light of *Anza* was an admission that the Court "had made a mistake by granting certiorari" on the enterprise issue. Opp. 1. This Court, of course, best understands the basis for that action, but it is at least equally plausible that *Anza* so obviously should have ended this litigation that this Court decided that resolving the enterprise issue was unnecessary at that time. In fact, it was Mohawk who suggested that "this Court vacate and remand ... in light of [the] decision in *Anza*." Pet'r Reply Br. 13 n.10, No. 05-465 (U.S. filed Apr. 11, 2006).

controlled. See *Cedric Kushner*, 533 U.S. at 163. *Cedric Kushner*, however, distinguished circuit court precedent rejecting an enterprise analogous to the one alleged in the instant case—one where a corporation is named as the defendant "and the corporation, together with all its employees and agents, were the 'enterprise.'" *Id.* at 164. The Court noted that such "precedent involved quite different circumstances which are not presented here." *Id.* Indeed, the Court expressed skepticism about such an enterprise, noting that it was an "oddly constructed entity." *Id.*

The Court should grant certiorari to decide the issue reserved in *Cedric Kushner*, and it should do so by resolving the critical antecedent question of whether a corporation may ever be a constituent part of an enterprise consisting of a "group of individuals associated in fact." 18 U.S.C. § 1961(4). See Pet. 20-22. Plaintiffs' claim that this issue has been "waived" (Opp. 9) is yet another mischaracterization in their attempt to avoid review.

Contrary to plaintiffs' suggestions, Mohawk has consistently maintained that the enterprise in this case is invalid. In fact, Mohawk's first argument in its motion to dismiss before the district court was that "THE COMPLAINT FAILS TO IDENTIFY A LEGALLY SUFFICIENT ENTERPRISE." Mot. to Dismiss 7, No. 4:04-CV-03 (N.D. Ga. filed Feb. 9, 2004). After a contrary ruling from the district court, that court granted Mohawk permission to file an interlocutory appeal as to whether "Plaintiffs had adequately pleaded the existence of a RICO enterprise." Pet. App. 71a-72a. Then, before the Eleventh Circuit panel, Mohawk continued to argue that the "Complaint fails to allege a RICO enterprise." Br. of Appellant 11, No. 04-13740 (11th Cir. filed Sept. 7, 2004).

Mohawk preserved the enterprise issue even in the face of Eleventh Circuit precedent that had long held that "a group of corporations can be a 'group of individuals associated in fact.'" *United States* v. *Navarro-Ordas*, 770 F.2d 959, 969

n.19 (11th Cir. 1985); see also *United States* v. *Goldin Indus.*, 219 F.3d 1271, 1277-78 (11th Cir. 2000). While that binding precedent precluded Mohawk from arguing that the district court or panel overrule *Navarro-Ordas* and *Goldin*, Mohawk preserved the overarching issue of whether plaintiffs had pled a legally cognizable RICO enterprise.[5]

In any event, plaintiffs' point misses the mark entirely because Mohawk *did* explicitly raise the foreclosed § 1961(4) argument both before the panel and the entire Eleventh Circuit. Mohawk specifically asserted that "the supposed 'association-in-fact' enterprise of Mohawk and its recruiters does not satisfy 18 U.S.C. § 1961(4), which defines 'association-in-fact enterprise' as 'a group of individuals associated in fact'—not a group of corporations."[6] Following a ruling by the panel on remand, Mohawk again specifically sought rehearing en banc on this issue and urged the Eleventh Circuit to grant rehearing in order to reconsider *Navarro-Ordas* and *Goldin* en banc. See Pet. App. 81a-84a.

Even if Mohawk had not raised the *argument* before the Eleventh Circuit (which it had), Mohawk's consistent pressing of the *issue* of whether plaintiffs pled a legally cognizable enterprise fully preserved all arguments supporting that issue. *See* Stern & Gressman, *Supreme Court Practice* § 6.26, at 421 (8th ed. 2002) ("Although the Court

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[5] *See MedImmune, Inc.* v. *Genentech, Inc.*, 127 S. Ct. 764, 770 (2007) (recognizing that failure to raise "precluded" arguments about a claim did "not suggest a waiver," but rather "counsel's sound assessment that the argument would be futile"). Even if Mohawk had not pressed this issue below (which it did), the Eleventh Circuit certainly passed upon the issue, relying upon *Goldin* to hold that RICO required only "'an association of individual entities.'" Pet. App. 7a-8a (quoting *Goldin*, 219 F.3d at 1275). *See Lebron* v. *National R.R.*, 513 U.S. 374, 379 (1995) ("Our practice permit[s] review of an issue not pressed so long as it has been passed upon." (internal quotation marks omitted)).

[6] Mohawk Supp. Br. 20 n.15 (11th Cir. filed Aug. 18, 2006) (recognizing that though "this panel may be bound by *Navarro-Ordas* ... Mohawk believes that *Navarro-Ordas* should be reconsidered en banc").

generally declines to review *issues* not pressed or passed upon by the lower courts, it has allowed petitioners to make new *arguments* in support of claims properly presented below.").[7] Parties need not "demand overruling of a squarely applicable, recent circuit precedent" to preserve issues for appeal to this Court. *United States* v. *Williams*, 504 U.S. 36, 44 (1992).[8]

Plaintiffs' contrary assertion that "Mohawk is still bound by the affirmative concessions it made in the lower courts" misstates both the law and the facts. Opp. 11. As to the law, respondent's argument misunderstands the doctrine of judicial estoppel. That doctrine only applies where the a party has "*prevail[ed]* in one phase of a case on an argument and then rel[ied] on a contradictory argument to prevail in another phase." *New Hampshire* v. *Maine*, 532 U.S. 742, 749 (2001) (emphasis added) (internal quotation marks omitted). Mohawk certainly did not "prevail" before either the district court or the court of appeals. Nor were Mohawk's statements "clearly inconsistent" with the position that binding precedent

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[7] *See also Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992) ("Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below."); *Lebron*, 513 U.S. at 378-79 (explaining "traditional rule" is to permit parties who have preserved claims before the lower courts to raise "new argument[s] to support ... [those] consistent claim[s]" and holding that argument that Amtrak was a government entity, which petitioner had "expressly disavowed" before district court and court of appeals, was nonetheless preserved because it was not "a new claim" but "a new argument" in support of claim that Amtrak was obliged to afford petitioner First Amendment rights).

[8] In fact, the correct interpretation of a statute is a question that will always be passed upon by a court applying that statute. *See United States Nat'l Bank of Ore.* v. *Independent Ins. Agents of Am.*, 508 U.S. 439, 446-47 (1993) ("[w]hen an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law" (internal quotation marks omitted)).

permitting a corporation to be a member of an association-in-fact enterprise should be overruled. *Id.* at 750.[9]

This Court has not even found estoppel in circumstances where a party failed to raise the argument below (which Mohawk did not fail to do here by specifically raising the issue of overruling binding precedent in the court below). Thus, in *PGA Tour, Inc.* v. *Martin*, 532 U.S. 661 (2001), the petitioner argued before the district court and court of appeals that it was not providing public accommodations subject to the Americans With Disabilities Act ("ADA"). See *id.* at 678. Before this Court, however, petitioner "reframe[d]" its argument to contend that the plaintiffs were not members of a

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[9] Instead, each of the three statements cited by plaintiffs (Opp. 9-10 & n.29) merely responded to plaintiffs' arguments that accepting the Seventh Circuit's reasoning in *Baker* would necessarily conflict with the Eleventh Circuit's holding in *Goldin* that a group of corporations could be an association-in-fact enterprise. Mohawk's response was to press the invalidity of the alleged enterprise by making *arguments* distinguishing *Goldin* (which was binding). As Mohawk acknowledged, "*current law* ... requires that to sufficiently allege a RICO enterprise, a plaintiff must allege that the enterprise is comprised of a corporation and a separate, independent third party." Br. of Appellant 12-13 (emphasis added) (cited in Opp. 10 n.29). Thus, when plaintiffs argued to the district court that the "allegations are sufficient because a corporation may be both the RICO 'person,' *i.e.*, the defendant, and part of an association in fact enterprise," Opp. to Mot. to Dismiss 7 (N.D. Ga. filed Mar. 9, 2004) (citing *Goldin*, 219 F.3d at 1275-76.), Mohawk explained that it agreed with plaintiffs' contention that under Eleventh Circuit law "a corporation can be both a RICO person and part of an association-in-fact enterprise," but that this was beside the point because "it is the RICO enterprise, not the employer, that must be operated through a pattern of racketeering activities," Reply in Supp. of Mot. to Dismiss 4-5 (N.D. Ga. filed Mar. 30, 2004). Likewise, before the panel, Mohawk responded to the argument that "*Baker* is ... inconsistent with this Court's precedents," by stating that "nothing in Mohawk's rule" that it urged upon the panel would be inconsistent with *Goldin*. Mohawk Reply 10-11 & n.8 (11th Cir. filed Nov. 5, 2004). Far from "advocat[ing]" the status quo, Opp. 11 n.32, these excerpts demonstrate nothing more than Mohawk's recognition of the settled circuit law that bound the district court and the panel.

protected class under the ADA. *Id.* Despite petitioner's "failure to make this exact argument below," this Court held that it had preserved the underlying issue of whether the ADA applied, and considered the argument. See *id.* at 678 n.27.[10]

In short, no obstacles prevent this Court's review of the significant enterprise question presented. As the U.S. Chamber of Commerce as *amicus curiae* notes (Br. 3-4), this case presents a rare opportunity to correct a fundamental misinterpretation of RICO's enterprise requirement because the issue is seldom raised in light of the uniformity of contrary authority. Without correction, plaintiffs will continue to file suits based upon legally flawed enterprises and extract unwarranted, unreviewable settlements.[11]

3. Finally, plaintiffs do not (and could not) deny that the circuit courts are divided in two significant ways over the construction of RICO's limitation of civil standing to plaintiffs "injured in [their] business or property." 18 U.S.C. § 1964(c). See Pet. 24-28. Plaintiffs concede that the Seventh Circuit's decision in *Evans* v. *City of Chicago*, 434 F.3d 916 (7th Cir. 2006) creates a circuit split with other courts readily finding lost wages to be a RICO injury. See Opp. 18 n.55. Plaintiffs, however, assert that the split is not

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[10] Plaintiffs rely (Opp. 11 nn. 33 & 34) upon entirely inapposite cases where this Court declined to consider an argument because it was not fairly comprised in the question presented. Here, however, the § 1961(4) argument is squarely within the question presented of "[w]hether a corporation and its agents can constitute an association-in-fact RICO enterprise." *See* Pet. i, 20-23. Plaintiffs also wrongly assert that Mohawk's counsel "conceded Mohawk's failure to preserve the issue" at oral argument. Opp. 10. To the contrary, Mohawk's counsel stated that the § 1961(4) question was a "logically prior question" that was "fairly subsumed within the question presented" as it was then phrased in the prior petition. Tr. Oral Arg. at 7, 10, No. 05-465 (U.S. Apr. 26, 2006).

[11] Indeed, plaintiffs' response is telling. Even though their RICO claim is fundamentally and incurably flawed, plaintiffs assert their "entitle[ment] to seek leave to amend their allegations" (Opp. 21), undoubtedly in the hope that in discovery a settlement could be extracted.

implicated here because *Evans* "agree[d] with the Eleventh Circuit's analysis," (*id.* at 19) in that *Evans* recognized an interest in business or property where a plaintiff could establish "a property right in promised or contracted for wages." *Evans*, 434 F.3d at 928. But plaintiffs here do not allege that they were deprived of "promised or contracted for wages." Plaintiffs received exactly the wages for which they bargained. Thus, the Seventh Circuit's recognition of "promised or contracted for" wages is fundamentally at odds with the Eleventh Circuit's unbridled holding that plaintiffs had "a legal entitlement to business relations unhampered by schemes prohibited by the RICO predicate statutes." Pet. App. 13a (internal quotation marks omitted).

Resolving the specific split over lost wages also affords the opportunity to resolve the underlying split over the meaning of "property" in RICO's civil standing provision. Pet. 25-27. Plaintiffs do not contest this split (Opp. 19-20), but note that the court below rested its decision on a "business" interest (Opp. 20). But the finding of a "business" interest quoted verbatim from the Ninth Circuit's finding of a "property" interest on similar facts. Pet. App. 13a (citing *Mendoza* v. *Zirkle Fruit Co.*, 301 F.3d 1163, 1168 n.4 (9th Cir. 2002)). More importantly, determining whether a claim for depressed wages supports civil RICO standing gives this Court the opportunity to give meaning to both the term "property" and the term "business," as those terms are used in § 1964(c).[12]

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

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[12] There is no merit to plaintiffs' argument that this Court should deny review because this case involves an interlocutory order. Opp. 20-22. This Court regularly reviews § 1292(b) appeals because they reflect the judgment of the district and circuit courts that a case presents important questions that may spare the courts and the parties undue expense. None of the "interlocutory" cases plaintiffs cite involves a § 1292(b) appeal.

Respectfully submitted,

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No. 06-873

FILED
JAN 22 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

MOHAWK INDUSTRIES, INC.,

Petitioner,

v.

SHIRLEY WILLIAMS, GALE PELFREY, BONNIE JONES, AND LORA SISSON, INDIVIDUALLY AND ON BEHALF OF A CLASS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America is a not-for-profit corporation that has neither a parent nor stockholders.

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest federation of businesses, representing an underlying membership of more than three million businesses and organizations of every size in every industrial sector and geographic region of the country. A principal function of the Chamber is to advocate the interests of the business community in courts across the Nation by filing *amicus curiae* briefs in cases involving issues of national concern to American businesses. The Chamber has participated as *amicus curiae* in numerous cases before this Court and the federal courts of appeals that have raised issues of vital concern to the Nation's businesses, including cases construing the Racketeer Influenced and Corrupt Organizations Act ("RICO"). The Chamber participated as *amicus curiae* when this case was previously before the Court. *See* Brief for the Chamber of Commerce of the United States of America, The National Federation of Independent Business Legal Foundation, and the Society for Human Resource Management as *Amici Curiae* in Support of Petitioner, *Mohawk Indus., Inc. v. Shirley Williams, et al.*, 126 S. Ct. 2016 (2006) (No. 05-465). The Chamber again comes before the Court given the compelling nature of these issues to American businesses.

[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, and that no person or entity other than the Chamber, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this *amicus* brief, and their consent letters are on file with the Clerk's Office.

The Chamber recognizes the importance of consistent and disciplined application of RICO to deter and remedy the wrongdoing prohibited by the statute. At the same time, the Chamber is concerned that the statute is now being misused throughout the federal courts against legitimate businesses, in large part because of the potential for plaintiffs to extract windfalls from American businesses through the statute's treble damages provision. *See* 18 U.S.C. § 1964(c).

The court of appeals' holding in this case that plaintiffs adequately pleaded a RICO "enterprise" consisting of the defendant corporation and its alleged agents is part of a dramatic expansion of RICO liability for American businesses. It converts a statute that was designed primarily to deter organized crime into a tool used to induce settlements from legitimate businesses that cannot risk either the possibility of being subjected to an award of treble damages or the reputational injury of being sued in federal court under a statute associated with racketeers and mobsters. This case thus presents the Court with the appropriate vehicle to stop the expansion of the RICO statute beyond the carefully delineated areas mandated by Congress. Because the Eleventh Circuit's decision has far-reaching and disastrous implications for countless businesses and the questions presented in this case have ramifications throughout the federal courts, the Chamber and its members have a strong interest in the Court granting plenary review and correcting the erroneous judgment of the court below.

SUMMARY OF ARGUMENT

As the petition explains, the traditional reasons for granting certiorari are clearly present here. Among other reasons, the decision below implicates a well-developed and deep split among the federal courts of appeals concerning an important and recurring question of federal law on which the

Court granted certiorari last Term in this very case.[2] *See Mohawk Indus., Inc. v. Williams*, 126 S. Ct. 830 (No. 05-465, Oct. 7, 2005); *see also* Pet. 10-24. But, *amicus* wishes to highlight additional reasons why it is important for this Court to again grant certiorari.

In addition to two other critical issues worthy of this Court's review, this case poses the important question "[w]hether a corporation and its agents can constitute an association-in-fact RICO enterprise." Pet. i. The petition persuasively explains how the courts of appeals are deeply divided as to whether such an enterprise can be distinct from the corporation itself and that the correct answer is that such a group cannot constitute a RICO enterprise. Pet. 16-24.

More fundamentally, however, this case raises the "antecedent" question whether "a corporation can [*ever*] be a member of a RICO association-in-fact enterprise." Pet. 20-21. RICO expressly defines an association-in-fact enterprise as "any group of *individuals* associated in fact although not a legal entity." 18 U.S.C. § 1961(4) (emphasis added). As the United States conceded when the Court addressed this very same issue last Term, a corporation is not an "individual" under § 1961(4). Brief for the United States as *Amicus Curiae* Supporting Respondents at 6, *Mohawk Indus., Inc. v. Shirley Williams, et al.*, 126 S. Ct. 2016 (2006) (No. 05-465) [hereinafter Brief for the United States as *Amicus Curiae* Supporting Respondents] ("[P]etitioner's premise [that a corporation is not an 'individual'] is correct."). Accordingly,

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[2] The case was briefed on the merits and argued before the Court in April 2006. After deciding *Anza v. Ideal Steel Supply Corp.*, 126 S. Ct. 1991 (2006), the Court issued an order in this case dismissing its partial grant of certiorari as improvidently granted, granting certiorari without limitation, vacating the lower court ruling, and remanding the case to the Eleventh Circuit for reconsideration in light of the *Anza* decision. Pet. App. 31a. As the petition shows, the Eleventh Circuit ignored the central holding of *Anza* on remand. *See* Pet. 10-16. For this reason as well, the Court's plenary review is warranted.

the plain statutory text mandates that a corporation cannot be a constituent of an association-in-fact RICO enterprise.

The courts of appeals have uniformly reached the wrong conclusion on this fundamental, threshold question of statutory construction.[3] Indeed, as discussed below, several members of this Court acknowledged as much when this very issue was argued last Term. The Court should resolve this threshold issue now. Doing so would resolve the issue upon which the courts of appeals *are* deeply divided—*viz.*, whether a corporation and its agents can be an association-in-fact enterprise distinct from the corporation itself. If, as petitioner and *amicus* contend, a corporation can never be part of a RICO association-in-fact enterprise, then it necessarily follows that neither can a corporation and its agents together comprise an association-in-fact enterprise distinct from the corporation.

Moreover, given the present uniformity in the courts of appeals, the Court should seize this opportunity to correct their uniformly wrong result. Indeed, absent immediate correction by this Court, RICO will continue to be used by plaintiffs and their attorneys to engage in meritless litigation against legitimate corporations in order to extract unwarranted settlements from them based on a clearly erroneous interpretation of the statute. And because cases such as this invariably settle, this Court may not soon have another opportunity to address this important question. This Court should not countenance the enormous costs that this would continue to impose on the Nation's economy.

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[3] *See, e.g.*, *United States v. London*, 66 F.3d 1227, 1243 (1st Cir. 1995); *United States v. Huber*, 603 F.2d 387, 394 (2d Cir. 1979); *United States v. Aimone*, 715 F.2d 822, 828 (3d Cir. 1983); *United States v. Najjar*, 300 F.3d 466, 484-85 (4th Cir. 2002); *United States v. Thevis*, 665 F.2d 616, 625 (5th Cir. 1980); *Bunker Ramo Corp. v. United Bus. Forms, Inc.*, 713 F.2d 1272, 1285 (7th Cir. 1983); *Atlas Pile Driving Co. v. DiCon Fin. Co.*, 886 F.2d 986, 995 n.7 (8th Cir. 1989); *United States v. Navarro-Ordas*, 770 F.2d 959, 969 (11th Cir. 1985); *United States v. Perholtz*, 842 F.2d 343, 353 (D.C. Cir. 1988).

ARGUMENT

THIS COURT'S REVIEW IS WARRANTED TO DETERMINE WHETHER A CORPORATE DEFENDANT CAN BE A CONSTITUENT OF A RICO ASSOCIATION-IN-FACT ENTERPRISE

Review of the Eleventh Circuit's erroneous and expansive reading of the RICO statute is essential because it is contrary to the statutory text and purpose of RICO. Because the decision below frustrates the operations of numerous businesses by subjecting them to the threat of treble damages and reputational injury, this Court should grant review to prevent the inevitable harm that businesses suffer under the Eleventh Circuit's misinterpretation of the RICO statute.

1. In this case, respondents allege that Mohawk Industries, Inc. ("Mohawk") is liable under RICO because it allegedly hired unauthorized workers and contracted with labor recruiters to assist it in hiring workers. Pet. App. 85a-109a. Respondents do not allege that Mohawk is the enterprise, nor do they allege that any recruiting company is the enterprise. Instead, respondents allege merely that the "association of Mohawk and the recruiters constitutes an association-in-fact enterprise." Pet. App. 102a.

The Eleventh Circuit held that respondents had stated a claim under RICO because Mohawk and the recruiters were a "'loose or informal' association of distinct entities." Pet. App. 8a. Under this reasoning, *all* transactions between a corporation and an individual or entity would subject the corporation to potential RICO liability. Indeed, whenever a corporation joins an individual or entity in a business venture, then, under the Eleventh Circuit's analysis, the two would together constitute a RICO association-in-fact enterprise. Moreover, this concept of enterprise makes it easy for a plaintiff to plead that a corporation participated in the conduct of the enterprise's affairs, *see* 18 U.S.C. § 1962(c), because it need only allege that the corporation exercised some degree of direction or control over the

venture. *See Reves v. Ernst & Young*, 507 U.S. 170, 179, 184 (1993) (describing the "conduct" element as requiring "some degree of direction" and an element of "control" over the enterprise's affairs). Accordingly, so long as a plaintiff can adequately plead a pattern of racketeering activity arising out of the venture, claims that ordinarily could only have been brought against the corporation as, for example, mail or wire fraud actions, *see* 18 U.S.C. §§ 1341, 1343, would instantly be transformed into private RICO claims for treble damages and their attendant stigma, *see* 18 U.S.C. § 1964(c). Such an outcome would "effectively eliminate the enterprise element and drastically expand federal jurisdiction over all business torts which involve use of the mails or telephones." *Seville Indus. Mach. Corp. v. Southmost Mach. Corp.*, 567 F. Supp. 1146, 1152 (D.N.J. 1983), *rev'd on other grounds*, 742 F.2d 786 (3d Cir. 1984).

RICO was never meant to countenance such a result. To the contrary, the statute's plain text and clear purpose confirm that Congress never intended to "RICO-ize" such broad swaths of business conduct.

a. RICO's plain text makes clear that a corporation cannot be part of an association-in-fact enterprise. The statute expressly defines the RICO "enterprise" to "include[] any individual, partnership, corporation, association, or other legal entity, and *any union or group of individuals associated in fact although not a legal entity*." 18 U.S.C. § 1961(4) (emphasis added). As the United States conceded last Term when confronted with this issue, a corporation is not an "individual" and therefore cannot be part of a union or group of *individuals* associated in fact. *See* Brief for the United States as *Amicus Curiae* Supporting Respondents at 6; Transcript of Oral Argument at 46-48, *Mohawk Indus.*,

Inc. v. Williams, 126 S. Ct. 2016 (Apr. 26, 2006) [hereinafter Transcript of Oral Argument].[4]

The conclusion necessarily follows from the text of § 1961(4) itself. The two clauses of § 1961(4) describe two *distinct* categories of associations which may qualify as RICO enterprises. *See United States v. Turkette*, 452 U.S. 576, 581-82 (1981). The first clause separately lists "any *individual*, partnership, [or] *corporation*" as entities that may constitute RICO enterprises. *See* 18 U.S.C. § 1961(4) (emphases added). The second clause then only includes a "union or group of *individuals*" as a RICO association-in-fact. *Id.* If the term "individuals" in the second clause was meant to encompass "corporations," then the separate listing of "corporations" in the first clause would be redundant and superfluous. It is, however, "a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)) (internal quotation marks omitted).

This distinction between corporations and individuals, moreover, follows from the ordinary usage of the term "individual." That term refers to "a single human being as contrasted with a social group or institution." *Webster's Third New International Dictionary of English Language* 1152 (1969); *see also American Heritage Dictionary of the English Language* 670 (1970) ("A single human being considered separately from his group or from society."). The

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[4] Unlike the courts of appeals, *see supra* note 3, some district courts have reached the correct result on this question. *See, e.g., United States v. McClendon*, 712 F. Supp. 723, 729 (E.D. Ark. 1988) (holding that a corporation is not an "individual" who may be a member of an association-in-fact enterprise); *Seville Indus. Mach. Corp.*, 567 F. Supp. at 1151 (holding that two corporations and two natural persons cannot constitute an association-in-fact enterprise).

definitional provision employed by Congress, the Dictionary Act, 1 U.S.C. § 1, which sets forth Congress's default statutory definitions, similarly distinguishes between an "individual" and a "corporation." It thus defines "person" to include "*corporations*, companies, associations, firms, partnerships, societies, and joint stock companies, as well as *individuals*." 1 U.S.C. § 1 (emphases added). In other words, the Dictionary Act, like common usage, recognizes that the term "individual" in a federal statute does not ordinarily refer to a "corporation." *See id.*

Finally, RICO's other provisions confirm that a "corporation" is not an "individual" and, therefore, cannot be part of a "union or group of *individuals* associated in fact." A companion provision, § 1961(3), defines "person" as "any *individual or entity* capable of holding a legal or beneficial interest in property." 18 U.S.C. § 1961(3) (emphasis added). The separate mention of "entity" indicates that Congress did not intend "individual" to embrace formal legal entities such as corporations.[5]

In short, the plain language of § 1961(4) illustrates that "whatever an individual is it's different than a corporation." Transcript of Oral Argument at 31 (statement of Roberts, C.J.).[6] And indeed, although some courts of appeals have

[5] *See also, e.g.*, 18 U.S.C. § 225 (setting the maximum fine for one who "organizes, manages, or supervises a continuing financial crimes enterprise" at $10 million "if an individual," and twice that "if an organization"); U.S. Sentencing Guidelines §§ 5E1.1, 8A1.2 (distinguishing between "individual" and "organization" for purposes of sentencing); *Blankenship v. W. Union Tel. Co.*, 161 F.2d 168, 169 (4th Cir. 1947) (concluding that the Fair Labor Standards Act's definition of "person" as an individual, partnership, or other legal entity signaled that a partnership was not an individual within the meaning of the Act).

[6] During oral argument on this issue last Term, several of the members of this Court recognized the persuasiveness of this position. *See* Transcript of Oral Argument at 29 (Chief Justice Roberts: "[I]t does seem kind of strange to encompass [corporations] under the term individuals when the same statute uses individuals and corporations separately."); *id.* at 30-31 (Justice Scalia: "A union of individuals or a group of individuals.

held that a corporation can be an "individual" under § 1961(4),[7] here, the question is not really in dispute. To the contrary, last Term the United States as *amicus curiae* conceded that a "corporation" is not an "individual" within the meaning of § 1961(4). *See* Brief for the United States as *Amicus Curiae* Supporting Respondents at 6; Transcript of Oral Argument at 46-48. Instead, the United States argued that the statutory enumeration in § 1961(4) was not *exhaustive* because it begins with the word "includes." *Id.* This too, however, is clearly wrong.

Congress frequently uses the term "includes" to introduce an exhaustive, rather than illustrative, statutory definition. *See Helvering v. Morgan's, Inc.*, 293 U.S. 121, 125-26 (1934). Section 1961(4) clearly exemplifies such an exhaustive usage. That section lists seven disparate forms of RICO enterprises, not a single example or an "obviously" incomplete listing. *See Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 78-79 (2002) (holding that an illustrative reading of "includes" is appropriate where it introduces a single example or an "obviously" incomplete listing). The inclusion of the phrase "or other legal entity" in the first clause, the omission of similar catch-all language or any

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You're still stuck with individuals . . . Either union means labor union or it means a union or group of individuals . . . So, you know, you're just as bad off."); *id.* at 31 (Chief Justice Roberts: "Well, it's not defined in the statute, but the prior list in the same sentence says individual, partnership, corporation. So you assume whatever an individual is it's different than a corporation or they wouldn't have to say corporation again."); *id.* at 32 (Justice Kennedy: "[W]e usually talk about person can mean a corporation. This says individual. A person is defined in – sub (3) just above it. A person includes any individual or entity. Then the next thing says individual. So . . . it doesn't sound like a corporation.").

[7] *See, e.g., United States v. Navarro-Ordas*, 770 F.2d 959, 969 n.19 (11th Cir. 1985) ("a group of corporations can be a 'group of individuals associated in fact'") (citation omitted).

mention of formal legal entities in the second clause, and the narrower use of "individual" in companion provisions evinces that Congress carefully drafted § 1961(4) as an exhaustive, rather than illustrative, definition of "enterprise."

Comparison with companion provisions removes any possible doubt that Congress employed "includes" in its exhaustive aspect in § 1961(4). Three other subsections of § 1961 use the term "includes" to introduce a statutory enumeration. *See* 18 U.S.C. §§ 1961(3), (9), (10). In each of these other three subsections, "it is unquestionable" that the term "includes" introduces an exhaustive list. Transcript of Oral Argument at 48 (statement of Scalia, J.) (noting that at oral argument the United States "did not refute the point that in other sections where it says includes, it is unquestionable that it is exclusive"). Section 1961(9), for example, provides that "'documentary material' *includes* any book, paper, document, record, recording, or other material." 18 U.S.C. § 1961(9) (emphasis added). The last three words would be superfluous if Congress regarded "includes" as a nonexclusive term. Similarly, § 1961(3) provides a comprehensive definition of "person," which "*includes* any individual or entity capable of holding a legal or beneficial interest in property." *Id.* § 1961(3) (emphasis added). Finally, § 1961(10) provides a definition of "Attorney General" which is clearly comprehensive. *See id.* § 1961(10) ("'Attorney General' *includes* the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter.") (emphasis added).

In addition, when Congress wanted to indicate that a list in RICO was illustrative and not exhaustive, it used the phrase "including, but not limited to." *See* 18 U.S.C. § 1964(a) (using phrase "including, but not limited to" twice to

clarify that a list is incomplete). The absence of that phrase from § 1961(4) is telling.

Indeed, a contrary understanding of the term "includes" would strip Congress's careful statutory definition of all meaning. If, as the United States argued last Term, this Court should look to the meaning of the term "enterprise" in isolation and ignore Congress's definition of that term, *see* Brief for the United States as *Amicus Curiae* Supporting Respondents at 12-13, that definition becomes utterly meaningless. That is not how Congress writes statutes, or how courts interpret them.

In all events, if there is any ambiguity in the scope of § 1961(4), the rule of lenity requires that it be resolved in favor of the defendant. The rule of lenity "ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered." *United States v. Lanier*, 520 U.S. 259, 266 (1997). "RICO, since it has criminal applications as well, must, even in its civil applications, possess the degree of certainty required for criminal laws." *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 255 (1989) (Scalia, J., concurring in the judgment); *see also Leocal v. Ashcroft*, 543 U.S. 1, 8 (2004) (the rule of lenity applies to statutes which have both civil and criminal applications) (citing cases). Thus, even if another reading of the statute is plausible, which it is not, § 1961(4)'s use of "includes" is "at least ambiguous," Transcript of Oral Argument at 47 (statement of Scalia, J.), and the rule of lenity requires that it be construed according to its narrowest reading—that only natural persons, and not legal entities such as corporations, may be constituents of an association-in-fact enterprise.

b. The plain meaning of § 1961(4) is in full accord with RICO's legislative history and purpose. The legislative history makes clear that Congress's avowed purpose in enacting RICO was "to seek the eradication of organized crime in the United States" and to counteract organized crime's infiltration and corruption of "legitimate businesses

and labor unions." Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 923 (1970). Thus, as Justice Alito has explained, RICO had "two aims: . . . to make it unlawful for *individuals* to function as members of organized criminal groups [and] . . . to stop organized crime's infiltration of legitimate businesses." Samuel Alito, Jr., *Racketeering Made Simple(r)*, in *The RICO Racket* 1, 3-4 (G. McDowell ed., 1989) (emphasis added).

Here, § 1961(4) fully meets these purposes under a plain language construction. The first clause of § 1961(4) defines a RICO "enterprise" to include any "individual, partnership, corporation, association, or other legal entity." It thus prohibits organized crime from infiltrating these legitimate businesses and using them for their nefarious purposes or from starting pretextually legitimate businesses in order to mask criminal activity. But § 1961(4) also recognizes that organized crime does not always—or even usually—act through the corporate form. To the contrary, it often acts through a loose association of individuals—as, for example, the fictional Corleone or Soprano families. The second clause of § 1961(4) thus defines a RICO enterprise to encompass a "union or group of individuals associated in fact although not a legal entity."

Nothing in RICO's text, legislative history, or overriding purpose, however, suggests that Congress was concerned about confederations of *corporations* banding together into a RICO "enterprise." To the contrary, Congress "had no reason whatsoever [for criminalizing] associations . . . of corporations with each other. And to do that, adding that in when it doesn't say that, would RICO-ize, with its treble damages and private plaintiffs and everything, vast amounts of ordinary commercial activity . . . . But Congress wouldn't have wanted to [do] that [as that had nothing] to do with organized crime . . . or [with] the taking over of legitimate enterprises [by organized crime]." Transcript of Oral Argument at 44-45 (statement of Souter, J.). Put another way, "Congress did not enact RICO because it was

concerned that criminal conspiracy law applied to corporations . . . . The whole point is that [Congress] had something significantly different in mind, and your allegations in the [*Mohawk*] complaint seem to be fully met by application of criminal conspiracy law." *Id.* at 36 (statement of Roberts, C.J.). In other words, RICO is not—and was never understood to be—necessary to prevent businesses from banding together to engage in illegal activities, because such concerns were already fully and adequately addressed in other laws, including, among others, statutes prohibiting criminal conspiracy, 18 U.S.C. § 371, and mail and wire fraud, *see* 18 U.S.C. §§ 1341, 1343.

Indeed, if anything, RICO was intended to *protect* businesses, not to impose a new and onerous burden on them by unnecessarily "RICO-izing" ordinary business transactions and subjecting businesses to RICO's treble damages provision. RICO's legislative history portrays corporations primarily as victims, rather than perpetrators, of organized crime, and shows the purpose behind RICO to be the cleaning up of infiltrated corporations and organizations through the prosecution of individual RICO defendants. *See, e.g.*, 116 Cong. Rec. at 602 (1970) (remarks of Sen. Hruska) (Title IX "contains a rather novel, and in my opinion, a most promising and ingenious proposal for crippling organized crime's relatively recent, but spectacularly successful, emergence into the field of legitimate business"); *id.* (Title IX was "designed to remove the influence of organized crime from legitimate business by attacking its property interests and by removing its members from control of legitimate busines[s]"); S. Rep. 91-617, at 1 (1969) (the "money and power" of organized crime "are increasingly used to infiltrate and corrupt legitimate business"). It would be the height of irony to transform RICO from a shield designed to *protect* legitimate businesses from misuse into an arbitrary and discriminatory weapon for imposing steep and onerous *costs* on businesses.

It is thus not at all surprising that in the course of adopting the RICO statute, Congress considered—and rejected—a proposal that arguably would have encompassed a combination of corporations. *See* S. 2187, 89th Cong. (1965). That proposal, Senate Bill 2187, would have outlawed membership in the Mafia or "any other organization having for one of its purposes" the commission of racketeering acts, *id.* § 2(a), and defined "organization" as "any group, society, confederation, or syndicate whose aims, objectives, and purposes" included the commission of racketeering-type acts, *id.* § 3(2). After Senate Bill 2187 failed to garner support, RICO was drafted with a specialized definition of "enterprise" that omitted the broad "any group" language.

In short, RICO's legislative history confirms what its text makes plain: A corporation is simply not an "individual" and, therefore, may not be part of a "union or group of individuals associated in fact."

c. Congress had sound practical reasons to fashion this focused and limited definition of an association-in-fact enterprise, and these reasons are frustrated by the prevailing misinterpretation of the courts of appeals. An enterprise consisting of a single entity is easy to identify. *See Bennett v. Berg*, 685 F.2d 1053, 1060 (8th Cir. 1982) ("An enterprise is particularly likely to be found where . . . the enterprise alleged is a legal entity rather than an 'associational enterprise.'"). But identifying association-in-fact enterprises presents unique challenges for courts. *See Chang v. Chen*, 80 F.3d 1293, 1297 (9th Cir. 1996) (noting that the issue of how much structure an association-in-fact enterprise must have "has divided the circuit courts that have considered it"). Some of these difficulties may reflect the inherent imprecision in the phrase "union or group of individuals associated in fact," but it is difficult to imagine that Congress would have intended to compound these difficulties by broadening the definitional sweep of § 1961(4) beyond what was necessary to achieve the goal of eradicating organized

crime. Expanding the list of potential association-in-fact constituents to include formal legal entities such as corporations threatens to do just that.

In sum, there is no statutory or historical reason to adopt the "strange" conclusion that RICO association-in-fact enterprises "encompass [corporations] under the term individuals when the same statute uses individuals and corporations separately." Transcript of Oral Argument at 29 (statement of Roberts, C.J.). This Court's full consideration is plainly warranted to correct the courts of appeals' rulings to the contrary.

2. The court below's misconstruction of RICO's association-in-fact enterprise requirement, if left intact, will continue the long march of the various courts of appeals to transform routine corporate conduct into conduct actionable under RICO. If this trend continues, then RICO will continue to impose significant and unintended costs on American businesses. And if review is not again granted in this case, plaintiffs and their attorneys will be further emboldened to hound American businesses, even when those businesses are engaged in standard, necessary, and lawful business practices.

a. Under the view adopted by the Eleventh Circuit and other courts of appeals, any "'loose or informal' association of distinct entities" is a RICO association-in-fact enterprise. *See* Pet. App. 8a. This renders virtually every relationship between a corporation and an individual or entity subject to potential RICO liability. Such a combination would, by definition, constitute an "enterprise," and it would be easy to allege that the corporation, as a key member of that so-called enterprise, was conducting its affairs. *See supra* Section 1, at 5-6. All a plaintiff need do, therefore, is allege a pattern of racketeering activity based, in many cases, on as few as two predicate acts from the myriad ones listed in 18 U.S.C. § 1961(1). If the plaintiff can meet this minimal pleading burden, it will survive a motion to dismiss and force the

corporation either to settle or endure the risk of treble damages and the stigma attached to the RICO statute.

b. This "RICO-ization" of ordinary business conduct imposes enormous costs on the national economy.

RICO's civil action is an "unusually potent weapon—the litigation equivalent of a thermonuclear device." *Miranda v. Ponce Fed. Bank*, 948 F.2d 41, 44 (1st Cir. 1991). Designed to deter and root out organized crime, its expanding scope through lower court interpretations provides an improper tool to induce settlements from legitimate businesses that cannot risk the possibility of being labeled as racketeers or subjected to an award of treble damages. *See* 18 U.S.C. § 1964(c). "Many a prudent defendant, facing ruinous exposure, will decide to settle even a case with no merit. It is thus not surprising that civil RICO has been used for extortive purposes, giving rise to the very evils that it was designed to combat." *Sedima v. Imrex Co., Inc.*, 473 U.S. 479, 506 (1985) (Marshall, J. dissenting) (citing Arthur F. Mathews, *et al.*, *Report of the Ad Hoc Civil RICO Task Force*, American Bar Ass'n Section of Corp. Banking & Bus. L., at 69 (1985)).

In addition to financial penalties, businesses experience "an almost inevitable stigmatizing effect" when sued in federal court under a statute associated with racketeers and mobsters. *Ruiz v. Alegria*, 896 F.2d 645, 650 (1st Cir. 1990). And with these twin tools at the ingenuous plaintiff's disposal, "RICO is evolving into something quite different from the original conception of its enactors." *Sedima*, 473 U.S. at 481, 500.

Indeed, the impact of the rule adopted by the courts of appeals on this question is evident, as the potential for treble damages has made RICO one of the most popular litigation tools of the plaintiff's bar. According to the Administrative Office of the U.S. Courts, 678 civil RICO actions were filed in federal court in the year ending March 31, 2006 (of which two were filed by the United States); 840 in the year ending

March 31, 2005 (of which eight were filed by the United States); 695 in the year ending March 31, 2004 (of which four were filed by the United States); 845 in the year ending March 31, 2003 (of which ten were filed by the United States); 707 in the year ending March 31, 2002 (of which seven were filed by the United States); and 791 in the year ending March 31, 2001 (of which four were filed by the United States). *See Federal Judicial Caseload Statistics*, Table C-2 (U.S. District Courts—Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit) for each respective year, *available at* http://www.uscourts.gov/library/caseloadstatistics.html) (last visited Jan. 22, 2007).

Although the Administrative Office does not account for which RICO cases involve corporate defendants, it is the experience of *amicus* and its members that the vast majority of these cases have been filed against corporations. Thus, while no precise number can be given, it is plain that with an average of roughly 760 civil RICO cases being filed each year coupled with the potential for treble damages, this "RICO-ization" of criminal and civil law threatens a significant portion of American businesses and thus the American economy.

RICO was not designed to do this. For, RICO is not a general criminal conspiracy statute or a basis for invoking federal jurisdiction over business torts. Instead, it is an "enterprise" statute aimed at persons, especially organized criminals, who victimize separate enterprises or use them as a vehicle for criminal activity. As several of this Court's members acknowledged at the April 2006 oral argument in this very case, to include corporations in the definitional sweep of "individuals" would do nothing to promote RICO's aim of eliminating organized crime.[8]

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[8] *See, e.g.*, Transcript of Oral Argument at 44-45 (Justice Souter: noting that Congress had "no reason" for extending the definition of enterprise to "associations . . . of corporations" because that that "would RICO-ize, with its treble damages and private plaintiffs and everything, vast

Nor is this potential for abuse theoretical. As Justice Marshall noted in 1985, "the ABA Task Force that studied civil RICO found that 40% of the reported cases involved securities fraud and 37% involved common-law fraud in a commercial business setting." *Sedima*, 473 U.S. at 506 (Marshall, J., dissenting). As shown above, this problem has only expanded in the intervening years with nearly 760 civil RICO cases being filed in the federal courts each year. Thus, RICO claims alleging commercial fraud are regularly brought against legitimate businesses, exposing businesses to RICO's treble damages provision and attendant stigma.[9] This "extortive" activity is precisely what Justice Marshall feared when, in *Sedima*, he decried RICO's "frequent[]" use "against legitimate businesses in ordinary commercial settings" and observed that "[m]any a prudent defendant, facing ruinous exposure, will decide to settle even a case with no merit." 473 U.S. at 506 (Marshall, J., dissenting). And this will only continue unless this Court acts to halt the misinterpretation of RICO in the lower courts.

c. Finally, the Court should resolve this issue now. As discussed above, the members of this Court recognized the importance of this issue last Term during oral argument. Resolution of this question, moreover, would resolve the deep circuit split over the question whether a corporation and its agents can constitute an enterprise distinct from the

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amounts of ordinary commercial activity" and activity that "has not to do with organized crime" or "with taking over legitimate enterprises"); *id.* at 44 (Justice Breyer: noting that Congress probably "put in the word group of individuals" because "it's possible that Congress was worried about organized crime taking over the pizza parlor or taking over a trades union or taking over a similar kind of enterprise").

[9] *See, e.g.*, *World Wrestling Entm't, Inc. v. Jakks Pac., Inc.*, 425 F. Supp. 2d 484 (S.D.N.Y. 2006); *Z-tel Commc'ns, Inc. v. SBC Commc'ns, Inc.*, 331 F. Supp. 2d 513 (E.D. Tex. 2004); *All World Prof'l Travel Servs., Inc. v. Am. Airlines, Inc.*, 282 F. Supp. 2d 1161 (C.D. Cal. 2003).

corporation itself. Finally, as the courts of appeals have uniformly come out the wrong way on this question, immediate intervention by this Court is necessary. As Justice Marshall correctly recognized in *Sedima*, given the enormous risks involved in defending RICO actions, most of these cases—including those involving meritless claims—will settle. This case thus presents the Court with a rare vehicle to resolve this vitally important issue. And absent such resolution, businesses across the Nation will continue to face the Hobson's choice of litigating or settling meritless claims based on an erroneous interpretation of the RICO statute. This Court should not countenance such a result, particularly with respect to a statute like RICO, with its already expansive reach, trebling of damages, and attendant stigma of being sued under a statute intended to target organized crime.

* * *

At bottom, the decision below threatens to convert a statute that was designed primarily to deter organized crime into a tool used to induce settlements from legitimate businesses that cannot risk either the possibility of being subjected to an award of treble damages or the reputational injury of being sued in federal court under a statute associated with racketeers and mobsters. And the impact of the decision below upon the business community cannot be understated: The Eleventh Circuit's judgment and the statutory misinterpretation underlying it will have far-reaching and disastrous implications for countless businesses. Given that the Eleventh Circuit's holding threatens to encumber businesses and to thwart a carefully crafted congressional statute, this Court's review is immediately warranted. Indeed, because most of these cases settle because of the lower courts' unitary, yet erroneous, view of the law, this case presents the Court with a rare vehicle for resolving this important issue. *Amicus* thus urges this Court to grant certiorari in order to curb the lower courts' erroneous expansion of the RICO "enterprise"

definition and to give effect to Congress's limitation of that definition to "a group of *individuals* associated in fact although not a legal entity." *See* 18 U.S.C. § 1961(4) (emphasis added).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 22, 2007